

# NOTES

## DEFINING RECESS APPOINTMENTS CLAUSE “VACANCIES”

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*The Recess Appointments Clause gives the President the power to “fill up all Vacancies that may happen during the Recess of the Senate.” Throughout American history, the Clause has been the subject of intense constitutional focus, as well as political jockeying between the legislative and executive branches. The recess appointment of Richard Cordray as the first Director of the Consumer Financial Protection Bureau in January 2012 brought new attention to the issue, raising novel constitutional questions about the propriety of modern uses of the recess appointment power. This Note addresses the question of whether the President is constitutionally empowered to make recess appointments to newly created offices and concludes that he is not.*

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## INTRODUCTION

In June 2009, five months after his inauguration, nine months after the collapse of Lehman Brothers,<sup>1</sup> and a year and a half after the United States officially fell into recession,<sup>2</sup> President Obama announced his intention to overhaul a financial regulatory regime that had been “overwhelmed by the speed, scope, and sophistication of a 21st century global economy.”<sup>3</sup> An essential element of the President’s reform agenda was the creation of a new agency charged with regulating “unfair and deceptive” consumer financial practices.<sup>4</sup> The President’s announcement touched off a year of legislative wrangling, culminating in a twenty-hour, through-the-night meeting of House and Senate negotiators. As the sun came up over Washington, D.C., on June 25, 2010, the congressional conferees approved, on a party-line vote, a final version of what would come to be known as the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).<sup>5</sup> Shortly thereafter, the full House and Senate each approved the bill.<sup>6</sup> And on July 21, President Obama signed Dodd-Frank into law.<sup>7</sup>

In keeping with the priorities the President set forth a year earlier, Dodd-Frank established a new regulatory agency, the Consumer Financial Protection Bureau (CFPB), charged with regulating “the

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<sup>1</sup> See *Lehman Brothers Holdings Inc.*, N.Y. TIMES, [http://topics.nytimes.com/top/news/business/companies/lehman\\_brothers\\_holdings\\_inc/index.html](http://topics.nytimes.com/top/news/business/companies/lehman_brothers_holdings_inc/index.html) (last updated Apr. 4, 2012) (“On Sept. 14, 2008, the investment bank announced that it would file for liquidation after huge losses in the mortgage market and a loss of investor confidence crippled it and it was unable to find a buyer.”).

<sup>2</sup> See *The Recession of 2007–2009*, U.S. BUREAU OF LABOR STAT. (Feb. 2012), <http://www.bls.gov/spotlight/2012/recession/> (“The most recent recession began in December 2007. . . .”).

<sup>3</sup> President Barack Obama, Remarks by the President on 21st Century Financial Regulatory Reform (June 17, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-of-the-President-on-Regulatory-Reform/](http://www.whitehouse.gov/the_press_office/Remarks-of-the-President-on-Regulatory-Reform/).

<sup>4</sup> *Id.*

<sup>5</sup> See Edward Wyatt & David M. Herszenhorn, *Accord Reached for an Overhaul of Finance Rules*, N.Y. TIMES, June 26, 2010, at A1 (describing the conference negotiations and agreement).

<sup>6</sup> In the House, 234 Democrats and 3 Republicans voted for the final bill, with 19 Democrats and 173 Republicans voting against it. See *Final Vote Results for Roll Call 413*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES (June 30, 2010), <http://clerk.house.gov/evs/2010/roll413.xml> (cataloging the vote totals, by party, in the House). In the Senate, 55 Democrats, 2 Independents, and 3 Republicans voted for the final bill, with 1 Democrat and 38 Republicans voting against it. See *U.S. Senate Roll Call Votes 111th Congress - 2nd Session*, U.S. SENATE (July 15, 2010), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=2&vote=00208](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00208) (cataloging the votes of individual senators, including their party affiliations).

<sup>7</sup> *Bill Summary and Status: 111th Congress (2009–2010)*, H.R. 4173, All Information, LIBR. OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR04173:@@L&summ2=m&#major%20actions> (last visited Sept. 13, 2012).

offering and provision of consumer financial products or services under the Federal consumer financial laws.”<sup>8</sup> A Director “appointed by the President, by and with the advice and consent of the Senate” was to head the CFPB.<sup>9</sup> Fearing a contentious and drawn-out confirmation battle, President Obama left the CFPB directorship unfilled for more than a year.<sup>10</sup>

During that time, Republicans assumed control of the House and began advancing measures to reduce the scope of the Bureau’s authority.<sup>11</sup> In the spring of 2011, forty-four Republican senators signed an open letter to the White House declaring their intention to defer consideration of *any* nominee to the position of CFPB Director until changes were made to the structure of the agency.<sup>12</sup> In effect, the Republican signatories pledged to use Senate rules to deny the President’s eventual nominee an up-or-down confirmation vote.

The signatories also maneuvered to prevent the President from using a recess appointment to circumvent the formal Senate confirmation process. During Congress’s ten-day Memorial Day recess, Republicans conducted three “pro forma” Senate sessions, briefly gaveling the deserted chamber into session every few days.<sup>13</sup>

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<sup>8</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010).

<sup>9</sup> *Id.*

<sup>10</sup> Rather than nominating a Director, President Obama instead named Elizabeth Warren—who is credited with conceiving the idea for a consumer protection-focused agency—as an assistant to the President and a special adviser to the Secretary of the Treasury. Warren was responsible for overseeing the creation of the CFPB while the top spot at the agency went unfilled. At the time, a White House source told the *New York Times* that “Mr. Obama. . . felt it was better to get [Warren] started on establishing an agency from scratch than on getting mired in a long confirmation fight.” Sewell Chan, *Interim Plan for Warren Raises Even Supporters’ Eyebrows*, N.Y. TIMES, Sept. 17, 2010, at B2; see also Binyamin Appelbaum, *Battle Lines Over a Reformer*, N.Y. TIMES, July 26, 2010, at B1 (describing Warren’s qualifications for a leadership position at the CFPB and noting the belief among her supporters that she “conceived the idea” for the CFPB and “helped shepherd its passage into law”).

<sup>11</sup> See Edward Wyatt & Ben Protess, *Foes Revise Plan to Curb New Agency*, N.Y. TIMES, May 6, 2011, at B1 (describing House Republicans’ efforts to reduce the authority of the CFPB, including one bill that would make it easier for other regulators to overturn CFPB regulations and another that would replace the Director with a five-person commission).

<sup>12</sup> See Meredith Shiner, *Senate GOP: We’ll Block Consumer Protection Nominee*, POLITICO (May 5, 2011, 4:51 PM), <http://www.politico.com/news/stories/0511/54403.html> (describing the letter and detailing Senate Republicans’ specific demands therein: that the CFPB be led by a board of overseers rather than a single director, that the CFPB be subject to congressional appropriations processes, and that a “safety-and-soundness check” on regulations be established).

<sup>13</sup> Alexander Bolton & Josiah Ryan, *GOP Forces Senate Pro-Forma Session*, THE HILL’S FLOOR ACTION BLOG (May 26, 2011, 7:49 PM), <http://thehill.com/blogs/floor-action/senate/163635-gop-pressure-forces-senate-to-work-in-pro-forma-session-blocking-elizabeth-warren-recess-appointment>.

Congressional leaders of both parties considered the pro forma sessions, a recent political innovation, to be an effective constitutional roadblock to the use of the presidential recess appointment power.<sup>14</sup>

Having lost the opportunity for a Memorial Day recess appointment, President Obama formally nominated Richard Cordray to serve as CFPB Director in July 2011.<sup>15</sup> But with Senate Republicans reiterating their intent to block the appointment of Cordray (or any other nominee), barring substantive changes to the authority of the CFPB, his confirmation seemed doubtful.<sup>16</sup> Then, on January 4, 2012, President Obama asserted his constitutional authority under the Recess Appointments Clause<sup>17</sup> and appointed Cordray the first Director of the CFPB in spite of additional pro forma sessions held during the New Year's recess.<sup>18</sup>

The Cordray appointment touched off a political firestorm. Many legal scholars, primarily conservative, decried the potentially unconstitutional abuse of presidential powers.<sup>19</sup> Other scholars, primarily liberal, rushed to the President's defense.<sup>20</sup> Both sides focused on the

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<sup>14</sup> See Carl Hulse, *Loneliest Man in Town? He's on the Senate Floor*, N.Y. TIMES, Nov. 21, 2007, at A16 (describing the first use of pro forma sessions—by Senate Majority Leader Harry Reid in 2007—to prevent recess appointments from taking place).

<sup>15</sup> Binyamin Appelbaum, *Former Ohio Attorney General to Head New Consumer Agency*, N.Y. TIMES, July 18, 2011, at B1. A former Ohio Attorney General, Cordray also oversaw the CFPB's enforcement division during its first year in operation. *Id.*

<sup>16</sup> See Ben Protess, *Nominee to Lead Consumer Agency Clears a Hurdle*, N.Y. TIMES DEALBOOK (Oct. 6, 2011, 11:55 AM), <http://dealbook.nytimes.com/2011/10/06/cordray-nomination-advances> (stating that Republican opposition could “scuttle Mr. Cordray’s nomination”).

<sup>17</sup> U.S. CONST. 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.”).

<sup>18</sup> Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1.

<sup>19</sup> See, e.g., Edwin Meese III & Todd Gaziano, Op-Ed., *Obama's Abuse of Power*, WASH. POST, Jan. 6, 2012, at A17 (“President Obama’s attempt to unilaterally appoint . . . Richard Cordray to head the new Consumer Financial Protection Bureau. . . is more than an unconstitutional attempt to circumvent the Senate’s advice-and-consent role. It is a breathtaking violation of the separation of powers. . . .”); John Yoo, *Richard Cordray & the Use and Abuse of Executive Power*, NAT’L REV. ONLINE (Jan. 5, 2012, 10:59 AM), <http://www.nationalreview.com/corner/287264/richard-cordray-use-and-abuse-executive-power-john-yoo> (“President Obama has exceeded his powers by making a recess appointment for Richard Cordray. . . .”).

<sup>20</sup> See, e.g., Laurence H. Tribe, Op-Ed., *Games and Gimmicks in the Senate*, N.Y. TIMES, Jan. 6, 2012, at A25 (“[T]he gimmicky nature of pro forma sessions is best understood as one among several factors that combine to present unconstitutional interference with the president’s irreducible power and duty. . . . Preserving the authority the president needs to carry out his basic duties . . . is our Constitution’s clear command.”); Victor Williams, *Supporting Obama: The Constitutional Case for Recess Appointments*, HUFFINGTON POST (Jan. 2, 2012, 10:07 PM), [http://www.huffingtonpost.com/victor-williams/supporting-obama-the-cons\\_b\\_1180216.html](http://www.huffingtonpost.com/victor-williams/supporting-obama-the-cons_b_1180216.html) (defending preemptively

validity of the exercise of the recess appointment power during the pro forma sessions.

In doing so, both sides overlooked a more basic question: whether the office to which President Obama appointed Cordray constituted a vacancy within the meaning of the Recess Appointments Clause. This Note contends that because the office of CFPB Director was newly created rather than previously occupied, it fell outside of the President’s appointment authority under the Recess Appointments Clause.

This question has escaped attention in large part because it is a factor in so few modern recess appointments: Of the numerous recess appointments made by the past four presidents, only a handful have been to newly created positions.<sup>21</sup> Furthermore, when presidents have made recess appointments to newly created positions, the appointments generally have been relatively less important and less controversial than the Cordray appointment,<sup>22</sup> which was not only President Obama’s first recess appointment to a newly created position, but also the only recess appointment to a newly created agency directorship in twenty years.<sup>23</sup>

Thus, while the question may arise infrequently, the Cordray appointment highlights the importance of determining what constitutes a recess appointment “vacancy.” The President’s recess

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President Obama’s ability to make a recess appointment to the CFPB, among other vacancies).

<sup>21</sup> Although there is no comprehensive accounting of the number of recess appointments made to newly created positions, the Library of Congress maintains a database of presidential nominations from 1987 to the present. *Search Presidential Nominations*, LIBR. OF CONGRESS, <http://thomas.loc.gov/home/nomis.html> (last visited Sept. 17, 2012). The Library of Congress has recorded more than 450 recess appointments during that time. *Id.* (search for “recess” to return the Library’s list of recess appointments). Less than fifteen percent of those approximately 450 appointments appear to have been to newly created positions. *Id.* (search for “New Position” on the list of recess appointments).

<sup>22</sup> I say “relatively less important and less controversial” because, while the individuals at issue may have inspired some controversy during their time, they generally served either as members of a board or as subordinates to other officials, and/or were appointed to previously established organizations in which new positions had been created. For example, during the Bill Clinton and George W. Bush administrations, those positions included Members of the Board of Directors of the Civil Liberties Public Education Fund, Members of the Federal Aviation Management Advisory Council, Members of the Social Security Advisory Board, an Inspector General of the Department of Homeland Security, and an Undersecretary at the Department of State. *Id.* (search for “recess” to view the Library’s list of recess appointments, including the above-cited positions).

<sup>23</sup> William Perkins, Lawrence Costiglio, Marilyn Seymann, and Daniel Evans, Jr. were appointed Directors of the Federal Housing Finance Board during a recess in January 1992. *Id.* In addition, although not a “Director,” Albert Casey was recess appointed as Chief Executive Officer of the Resolution Trust Corporation, a new position, during the same January 1992 recess. *Id.*

appointment to the newly created agency directorship empowered the CFPB to undertake critical tasks that it could not accomplish without a Director. For instance, without a Director the CFPB could not supervise non-bank financial institutions (such as payday lenders), undertake consumer compliance enforcement actions against “smaller depository institutions” (including banks and credit unions with less than \$10 billion in assets),<sup>24</sup> or issue new rules in connection with either of the above responsibilities.<sup>25</sup> Because the Senate had made clear its intent to prevent *any* Director from assuming leadership at the CFPB until substantive changes were made to the structure of the agency,<sup>26</sup> it can safely be asserted that the CFPB in its current form could not have undertaken any of those actions absent the recess appointment of Richard Cordray. The President’s broad interpretation of the Recess Appointments Clause empowered him to “take care” that the Dodd-Frank Act “be faithfully executed.”<sup>27</sup>

However, the President’s interpretation also deprived the Senate of its ability to influence the direction of a newly created agency at a critical time. Historically, the confirmation process has been an important tool that the Senate has wielded “to influence the direction and substance of national policy.”<sup>28</sup> During the confirmation process, senators may educate nominees about issues they consider important and even secure promises from nominees regarding the policies they intend to pursue or the actions they are likely to take.<sup>29</sup> Although it might be argued that the Senate forfeited its right to such opportunities by failing to act upon the President’s nominee prior to the New Year’s recess, we might also ask whether the Constitution explicitly preserves the Senate’s right of advice—without exception—in the case of newly created offices. After all, the first person to hold an office is certain to leave an outsized imprint on his or her agency by making

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<sup>24</sup> DAVID H. CARPENTER ET AL., CONG. RESEARCH SERV., R42323, PRESIDENT OBAMA’S JANUARY 4, 2012, RECESS APPOINTMENTS: LEGAL ISSUES 28 n.159 (2012) (citing Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 §§ 1024, 1026, 124 Stat. 1987, 1993 (2010) and 12 U.S.C. §§ 5514, 5516).

<sup>25</sup> *Id.* at 27–28 & n.159 (describing limitations on the interim powers granted to the Treasury Secretary, who was tasked with overseeing the CFPB prior to the confirmation of a CFPB Director).

<sup>26</sup> See *supra* note 16 and accompanying text (noting that Senate Republicans expressed their intent to prevent the confirmation of any individual to the CFPB directorship).

<sup>27</sup> See U.S. CONST. art. II, § 3, cl. 5 (“[The President] shall take Care that the Laws be faithfully executed. . . .”).

<sup>28</sup> MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 175 (2000).

<sup>29</sup> See *id.* (“The confirmation process has provided excellent opportunities for senators to sensitize nominees about particular issues. . . and to extract promises. . . from nominees to nonjudicial offices in exchange for their confirmation.”).

critical early decisions about how to effect the agency’s statutory purpose.

With a focus on both the importance of the President’s duty to faithfully execute the laws and the Senate’s role in the appointment process, this Note proceeds in three parts. Part I examines the evolution of congressional and executive interpretations of the Recess Appointments Clause generally. Part II explores historical evidence regarding founding-era interpretations of the Clause as it relates to newly created offices. Given the paucity of modern debate on the issue, that evidence provides some of the most thorough insight into the meaning of a Recess Appointments Clause “vacancy.” Part III considers judicial decisions involving the Clause and the practical implications of limiting the President’s recess appointment authority to previously occupied offices.

Ultimately, based on both historical evidence favoring a narrow definition of “vacancy” and the good-government advantages to be gained from such a definition, this Note concludes that the term “vacancy,” as it is used in the Recess Appointments Clause, should be interpreted to encompass only previously occupied offices.

## I

### THE RECESS APPOINTMENTS CLAUSE GENERALLY

The Recess Appointments Clause provides that “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”<sup>30</sup> This Part details the Constitutional Convention’s framing of that grant of power and its general purpose within the larger constitutional framework in which appointments were to take place. This Part then turns briefly to an early dispute concerning the scope of the recess appointments power: whether the Recess Appointments Clause sanctions appointments only to those vacancies that “happen to arise” during a recess of the Senate—as was asserted during the first few decades after the Founding—or whether it allows the President to make appointments to vacancies that simply “happen to exist” during a recess of the Senate—as has been the case in modern times.

This dispute is worth addressing before considering the debate over the meaning of a Recess Appointments Clause “vacancy” for two reasons. First, the shift enabled the modern expansion of the presidential recess appointment power, and any debate regarding the proper scope of Recess Appointments Clause “vacancies” must take place

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<sup>30</sup> U.S. CONST. art. II, § 2, cl. 3.

against the backdrop of that expansion. Second, the debate over when the President may make recess appointments shares common concerns with the debate over the President's power to make recess appointments to newly created offices. Both reflect the underlying tension between the desire for Senate-executive cooperation and the need to promote functional, effective government.

### A. *The Adoption of the Recess Appointments Clause*

Richard Dobbs Spaight of North Carolina offered the Recess Appointments Clause for the consideration of the Constitutional Convention on September 7, 1787.<sup>31</sup> With the bulk of the Constitution drafted, the most contentious debates settled, and the hottest days of the summer behind them, the convention delegates affirmed the Clause unanimously.<sup>32</sup> Its inscription into America's founding document merited but a single mention in the fulsome notes of James Madison,<sup>33</sup> and the Clause was entirely overlooked in the notes and records of other delegates.<sup>34</sup>

The relatively narrow, practical considerations precipitating the inclusion of the Recess Appointments Clause in the Constitution may explain, in part, this lack of attention. Before the Clause was voted upon, the general method of appointing judges and principal officers of the United States had already been established: presidential nomination followed by Senate advice and consent.<sup>35</sup> The Recess

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<sup>31</sup> JAMES MADISON'S NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 594, 599 (1984).

<sup>32</sup> *Id.* at 599.

<sup>33</sup> *Id.*

<sup>34</sup> Among a number of other records of the convention, none mention the September 7, 1787 vote. *See, e.g.*, NOTES OF RUFUS KING IN THE FEDERAL CONVENTION OF 1787, H.R. DOC. NO. 69-398, AT 844-78 (1ST SESS. 1927); NOTES OF THE SECRET DEBATES OF THE FEDERAL CONVENTION OF 1787, H.R. DOC. NO. 69-398, AT 746-843; NOTES OF WILLIAM PATTERSON IN THE FEDERAL CONVENTION OF 1787, H.R. DOC. NO. 69-398, AT 879-912; PAPERS OF DR. JAMES McHENRY ON THE FEDERAL CONVENTION OF 1787, H.R. DOC. NO. 69-398, 923-52.

<sup>35</sup> U.S. CONST. ART. II, § 2, CL. 2. In contrast to the Recess Appointments Clause, the general advice-and-consent process had been the subject of great debate at the Constitutional Convention. *See* GERHARDT, *supra* note 28, at 16-17 (describing the debate as concerning "whether the power [of appointment] should be vested in the entire legislature, as proposed in the original Virginia Plan; in the Senate alone; in the president alone; or in the president with the advice and consent of the Senate"). As described by Alexander Hamilton, the virtue of the advice-and-consent model lay in its power to "beget a livelier sense of duty" in the President than a collective process might create while still allowing for an "excellent check upon a spirit of favoritism" in the form of Senate confirmation. THE FEDERALIST NO. 76, AT 228-29 (ALEXANDER HAMILTON) (MICHAEL A. GENOVESE ED., 2009).

Appointments Clause was merely intended to preserve the President’s ability to fill critical positions when Congress was not in session.<sup>36</sup>

In early America, this was no small concern. Congress was in recess more than it was in session—often for more than six months at a time.<sup>37</sup> A vacancy lasting the duration of such a recess, or close to it, might seriously impair the ability of the President to manage the important affairs of the young nation.<sup>38</sup> Although the Senate could ostensibly be called back into session in the event of a national crisis, recalling senators from their far-flung hometowns would be a significant challenge in the era of horse-and-coach travel.<sup>39</sup>

The Recess Appointments Clause obviated the need to recall Congress each time an important federal office became vacant. But it did not empower the President to put off indefinitely the process of Senate advice and consent; the President’s recess appointments expired at the end of the Senate’s next session.<sup>40</sup> A longer term of office for his appointee could only be secured through Senate confirmation. The Recess Appointments Clause, therefore, had a practical purpose in early American history, but likely not one the framers believed would inspire substantial use or controversy.

### B. A Preliminary Controversy

The debate that had been passed over at the Constitutional Convention—when and under what circumstances the President was authorized to make a recess appointment—was quickly taken up by government officers. Specifically, they sought to clarify when, in the

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<sup>36</sup> See THE FEDERALIST No. 67, at 187 (Alexander Hamilton) (Michael A. Genovese ed., 2009) (asserting that the Recess Appointments Clause was intended merely as “an auxiliary method of appointment” for use when the Senate was out of session and therefore unavailable to approve nominees to offices “which it might be necessary for the public service to fill without delay”); see also GERHARDT, *supra* note 28, at 355 n.9 (explaining that the Recess Appointments Clause was enacted as a result of the framers’ recognition “that the Senate would not always be in session to give advice and consent to presidential nominations” and to give the President the authority necessary to make appointments during those periods).

<sup>37</sup> See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1498 (2005) (“When the Constitution was written, inter-session recesses regularly lasted between six and nine months.”).

<sup>38</sup> See *id.* (discussing the “unattractive alternatives” that would have been available to leaders in the event of such a vacancy under a Constitution without a Recess Appointments Clause).

<sup>39</sup> See *id.* (noting that recalling senators during a recess “would be burdensome in a large nation during an age of slow transport”).

<sup>40</sup> Recall that the Clause in its entirety provides that “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. CONST. art. II, § 2, cl. 3 (emphasis added).

language of the Constitution, a vacancy could be said to “happen” during a recess of the Senate.<sup>41</sup> The following two sections trace the evolution from the antiquated position that the Clause empowers the President to fill only those vacancies that “happen to arise” during a recess of the Senate to the modern belief that the Clause applies to all vacancies that “happen to exist” during a Senate recess.<sup>42</sup>

### 1. Vacancies That “Happen to Arise”

The question of whether the Recess Appointments Clause sanctioned presidential appointments to all vacancies *existing* during a Senate recess or only to those vacancies that *arose* during the recess initially presented itself before the end of George Washington’s first term.<sup>43</sup> Edmund Randolph, a delegate to the Constitutional Convention and the United States’ first Attorney General,<sup>44</sup> offered his opinion on the matter in a letter to Secretary of State Thomas Jefferson.<sup>45</sup> In that letter, Randolph argued for a narrow interpretation of the Recess Appointments Clause—one that preserved the ability of the President to make recess appointments when it would be “inconvenient to summon the senate” into session to approve a necessary appointee, but that also honored the “Spirit of the Constitution,” which “favors the participation of the Senate in all appointments.”<sup>46</sup> This balance would be best preserved, he asserted, if the Recess Appointments Clause were interpreted to convey to the President the power to make recess appointments only to vacancies that arose during the recess of the Senate.<sup>47</sup> Under this interpretation, if an

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<sup>41</sup> *Id.*

<sup>42</sup> As noted in this subpart, modern practice is to make appointments to vacancies that “happen to exist” during the Senate recess. However, one recent case has challenged this practice. *See Canning v. NLRB*, No. 12-1115, 2013 U.S. App. LEXIS 1659, at \*45 (D.C. Cir. Jan. 25, 2013) (asserting in dicta that only vacancies actually arising during a recess can be filled by the President through his constitutional recess appointment power).

<sup>43</sup> The controversy concerning the Recess Appointments Clause was precipitated by the adjournment of the Senate in May 1792, which came after Congress created the Office of Chief Coiner of the Mint but before the Senate confirmed anyone to fill the office. Rappaport, *supra* note 37, at 1518–19.

<sup>44</sup> *See America’s Founding Fathers: Delegates to the Constitution*, U.S. NAT’L ARCHIVES & RECORDS ADMIN., [http://www.archives.gov/exhibits/charters/constitution\\_founding-fathers.html](http://www.archives.gov/exhibits/charters/constitution_founding-fathers.html) (last visited Oct. 16, 2012) (detailing the biography of Edmund Randolph and other delegates to the Constitutional Convention).

<sup>45</sup> This letter is discussed in greater detail as it pertains to the definition of Recess Appointments Clause “vacancies,” *infra* notes 74–79 and accompanying text.

<sup>46</sup> Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON 165, 166 (John Catanzariti et al. eds., 1990).

<sup>47</sup> *Id.* Although Randolph did not himself use the “arise” language, his interpretation of the Recess Appointments Clause has been characterized as supporting that view. *See* Rappaport, *supra* note 37, at 1518–19 (“Randolph in a few paragraphs articulated the main pillars of the arise interpretation. . . .”).

appointee died or resigned during the recess, for example, the President could constitutionally fill the position through a recess appointment.<sup>48</sup> But he could not make a recess appointment to a new statutorily created position, since the “vacancy” in such a position would arise on the day that Congress authorized the creation of the new office and would thus predate the Senate recess.<sup>49</sup>

## 2. Vacancies That “Happen to Exist”

In 1823, Attorney General William Wirt’s interpretation officially supplanted that of Edmund Randolph.<sup>50</sup> In response to an inquiry regarding a possible recess appointment to a position left vacant after the former occupant tendered his resignation during the most recent session of the Senate, Wirt opined that the President could fill all vacancies that “happen to exist” during a recess of the Senate, as well as those which “happen to occur” during the recess.<sup>51</sup> This interpretation of the Recess Appointments Clause was proper, Wirt asserted, because “[t]he substantial purpose of the constitution was to keep . . . offices filled; and powers adequate to this purpose were intended to be conveyed.”<sup>52</sup> Where Randolph had prioritized the Senate’s power of advice and consent in his interpretation, Wirt prioritized the continuity of governmental operations and criticized the earlier interpretation for “overlook[ing] the spirit, reason, and purpose” of the Clause.<sup>53</sup> Like Randolph’s opinion, though, Wirt’s view was consistent with a narrow reading of the term “vacancy” in the Recess Appointments Clause. Wirt based his interpretation on the need to “keep” offices filled in order to prevent a vacancy from “paralyz[ing] a whole line of action in some essential branch,” rather than the need to fill new offices or jumpstart action in a new branch, agency, or office.<sup>54</sup>

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<sup>48</sup> See Randolph, *supra* note 46, at 166 (arguing that the curtailment of the Senate’s role in evaluating and confirming nominees should be limited by recess appointments only in “a case of necessity. . . as where the Officer has died, or resigned during the recess”).

<sup>49</sup> See *id.* at 166–67 (asserting that the President could not fill the Office of the Chief Coiner because the “vacancy”—as Randolph broadly interpreted the word—in that office dated to its creation during the most recent session of the Senate).

<sup>50</sup> See Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 401 (2005) (“From 1823 through the present, the rejection of the Randolph interpretation has become firmly established. In that year, . . . William Wirt interpreted the Recess Appointments Clause to permit a recess appointment so long as the vacancy happens to exist during the recess. . . .”).

<sup>51</sup> Exec. Auth. to Fill Vacancies, 1 Op. Att’y Gen. 631, 632–33 (1823).

<sup>52</sup> *Id.* at 632.

<sup>53</sup> *Id.* at 634.

<sup>54</sup> *Id.* at 632.

Subsequent acquiescence by both Attorneys General and the Senate has sanctioned Wirt's interpretation.<sup>55</sup> Modern recess appointments are regularly made to vacancies that "happen to exist" during a recess of the Senate, as well as those which "happen to arise" during a recess.<sup>56</sup> Interpreting the term "vacancy" to exclude newly created offices would not affect this status quo. It would simply mean that no vacancies "happened to exist" when a newly created office was left empty at the end of a Senate session.

## II

### HISTORICAL INTERPRETATIONS OF RECESS APPOINTMENTS CLAUSE "VACANCIES"

Unlike the temporal requirements of the Recess Appointments Clause—*when* a vacancy "may happen" such that the President may make a recess appointment—there is no modern consensus regarding *what* constitutes a "vacancy" under the Recess Appointments Clause.<sup>57</sup> That is not to say that there has been a great deal of dispute about whether a newly created office constitutes a Recess Appointments Clause "vacancy" either.<sup>58</sup> On the contrary, prior to the Cordray appointment, modern recess appointments to newly created offices (as opposed to previously occupied offices) were simply too rare and too inconsequential to inspire significant commentary on the matter one way or the other.<sup>59</sup> Thus, it is appropriate to turn to the

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<sup>55</sup> Hartnett, *supra* note 50, at 403–04.

<sup>56</sup> See *infra* notes 138–39 and accompanying text (providing examples of recess appointments that confirm this practice).

<sup>57</sup> A 1992 Office of Legal Counsel opinion briefly addressed the question, concluding that "the President has the power to make an original recess appointment to a newly created position." *Recess Appointments During an Intrasession Recess*, 16 Op. O.L.C. 15, 16–17 (1992). However, following the President's recess appointment of Cordray to the newly created CFPB directorship, congressional leaders objected that the appointment was improper because there was no "vacancy" in the Director position. *See, e.g.*, Letter from Spencer Bachus, Chair, House Fin. Servs. Comm., to Eric Holder, Attorney Gen., Dep't of Justice (Jan. 6, 2012), available at <http://online.wsj.com/public/resources/documents/HolderLetter0106.pdf> (noting that the view that a newly created office constitutes Recess Appointments Clause "vacancy" conflicts "with the Vacancies Reform Act (Pub. L. No. 105-277), which purports to codify certain aspects of the exercise of the recess appointment power and does not appear to provide that a newly created office like the directorship of the Bureau is 'vacant'").

<sup>58</sup> *See Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 1 (2012), available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf> [hereinafter 2012 OLC Opinion]. The opinion omits any discussion of the definition of a recess appointment "vacancy" and presumably indicates the Office of Legal Counsel's assumption of a lack of controversy on this issue.

<sup>59</sup> *See supra* notes 21–23 and accompanying text (discussing modern recess appointments to newly created offices before the Cordray appointment).

text of the Constitution and early constitutional debate regarding recess appointments made to newly created offices, which was frequent and passionate.

This textual-historical approach is widely accepted as a valid interpretive methodology.<sup>60</sup> Indeed, the only federal court apparently to have directly addressed the question of the constitutionality of recess appointments to newly created offices adopted the historical approach.<sup>61</sup> Moreover, the essence of the question at issue is the same today as it was two hundred years ago.

The early debates discussed in this Part highlight the persistent Recess Appointments Clause tension between Senate advice and consent and presidential authority to oversee the functioning of the executive branch, considerations that remain relevant to modern efforts to interpret the Clause. An analysis of these debates—and the language of contemporaneous sources that likely informed them—therefore provides an appropriate foundation for evaluating the policy arguments that will be discussed in Part III. To that end, this Part first examines the use of the term “vacancy” in the Constitution itself and in other important founding-era sources. It then traces a series of disputes regarding the meaning of that term that took place during four early presidential administrations.

#### A. *The Constitutional Text*

Outside of the Recess Appointments Clause, the term “vacancy” appears in four places in the original text of the Constitution.<sup>62</sup> The

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<sup>60</sup> See, e.g., Antonin Scalia, *Foreword to ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 44 (Steven G. Calabresi ed., 2007) (noting that “[o]riginalism is in the game, even if it does not always prevail,” and maintaining that it has, in fact, prevailed in a number of recent Supreme Court cases).

<sup>61</sup> See *Schenck v. Peay*, 21 F. Cas. 672, 674 (E.D. Ark. 1869) (No. 12,451). The case concerned the constitutionality of President Lincoln’s recess appointment of Josiah Snow to the never-before-occupied office of Arkansas Tax Commissioner. *Id.* In reaching its decision, the court turned to, among other sources, early constitutional scholarship and the opinions of early executive and Senate leaders on previously disputed appointments. *Id.* at 675. Ultimately, the court found that Snow’s appointment was “without authority of law and void.” *Id.* However, the decision was made, at least in part, on the basis of the antiquated “happen to arise” interpretation of the Recess Appointments Clause. *See id.* at 674–75 (finding the appointment void because the “vacancy” in that position “may have existed, but did not happen, during the recess of the senate”). The case therefore may be of limited modern value. It should be noted, though, that the court treated with some skepticism the idea that an opening in a newly created office should be termed a “vacancy.” *See id.* (questioning whether the term “vacancy” “is at all appropriate in this connection” and noting Webster’s assertion that “[v]acancy adds the idea of a thing having been previously filled”’).

<sup>62</sup> U.S. CONST. art. I, § 2, cl. 4 (“When *vacancies* happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such *Vacancies*.” (emphasis added)); U.S. CONST. art. I, § 3, cl. 2 (“The Seats of the Senators of

term (or its adjectival form, “vacant”) was also used nineteen times in the Federalist Papers.<sup>63</sup> In both the Constitution and the Federalist Papers (in the instances where the term refers to unfilled offices), it refers exclusively to previously occupied offices made vacant by the death or resignation of their occupants—for example, Senate seats that might happen to become empty.<sup>64</sup>

This meaning is consistent with definitions provided by contemporaneous sources.<sup>65</sup> Eighteenth-century European dictionaries defined the term “vacant” as “abandoned for want of an Heir, after the Death or Flight of their former Owner”<sup>66</sup> and “[n]ot filled by an incumbent.”<sup>67</sup> Still, the term was not without ambiguity. For example, one source described “vacancy” as the “[s]tate of a post or

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the first Class shall be vacated at the Expiration of the 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*. (emphasis added)).

<sup>63</sup> See, e.g., THE FEDERALIST No. 55, at 342 (James Madison) (Garry Wills ed., 2003) (“No offices . . . can be dealt out to the existing members [of Congress], but such as may become *vacant* by ordinary casualties. . . .” (emphasis added)); THE FEDERALIST No. 63, at 388 (James Madison) (Garry Wills ed., 2003) (“[The Maryland Senate] is distinguished also by the remarkable prerogative of filling up its own *vacancies* within the term of its appointment. . . .” (emphasis added)); THE FEDERALIST No. 67, at 410 (Alexander Hamilton) (Garry Wills ed., 2003) (“[T]he temerity has proceeded so far as to ascribe to the President of the United States a power, which by the instrument reported is *expressly* allotted to the executives of the individual States. I mean the power of filling casual *vacancies* in the Senate.” (second emphasis added)).

<sup>64</sup> See *supra* note 62–63. Although the term is used almost exclusively in regard to offices, the Federalist Papers in one instance refer to the empty Western lands as “vacant.” THE FEDERALIST No. 7, at 33 (Alexander Hamilton) (Garry Wills ed., 2003).

<sup>65</sup> For some, dictionaries are an important aid in determining the meaning of laws and other documents, and consistently are used for that purpose. See, e.g., Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 85–86 (2010) (describing the frequency with which the Supreme Court has cited to dictionaries in its opinions throughout American history). However, such reliance on dictionaries is not uncontroversial. See, e.g., Rickie Sonpal, Note, *Old Dictionaries and New Textualists*, 71 FORDHAM L. REV. 2177, 2180 (2003) (asserting that “old dictionaries are not reliable tools for determining the meaning of a word at the time of the dictionary’s publication”). Here, reference to founding-era dictionaries is merely intended to offer evidence that the term “vacancy” *might* have been understood as limited to previously occupied offices. The context in which the term was used is a better indicator of whether that *was* the meaning intended.

<sup>66</sup> N. BAILEY, DICTIONARIUM BRITANNICUM, at VA (1730).

<sup>67</sup> 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE, at VAC (3d ed. 1755) (providing the following example of the term in use: “Others when they allowed the throne *vacant*, thought the succession should immediately go to the next heir.”). Although Johnson also defined “vacant” as “[n]ot filled by . . . [a] possessor,” his illustration of this meaning makes clear that the definition relates to possessors of land, in particular. See *id.* (“Let the fiend invade *vacant* possession.”).

employment when it is unsupplied.”<sup>68</sup> By the early nineteenth century, American dictionaries would reflect not only this ambiguity but also the political disputes it generated.<sup>69</sup> Indeed, controversy surrounding the Recess Appointments Clause animated debate in early Congresses and sparked disagreement in early presidential administrations.

In Congress, the salient question was whether to extend to the President, by law, the power to fill newly created offices with recess appointments if those offices were not filled by the time Congress adjourned. Many early laws granted the President such authority, enabling the President to fill new positions quickly.<sup>70</sup> Where such authority was not explicitly granted, Congress debated whether it should be explicitly denied.<sup>71</sup> Ultimately, Congress concluded that statutory denial of recess appointment authority with regard to newly created offices would be redundant. Congress felt that because the Recess Appointments Clause did not give the President the constitutional power to make recess appointments to newly created offices, merely withholding statutory authority to make such appointments was sufficient.<sup>72</sup> These debates lent credence to those who later argued that the President could not unilaterally make recess appointments to newly created positions, and empowered Congress to oppose

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<sup>68</sup> *Id.*

<sup>69</sup> See, e.g., JOHN BOUVIER, 2 A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION 597 (2d ed. 1843) (“VACANCY. A place which is empty. The term is principally applied to cases where an office is not filled. By the constitution of the United States, the president has the power to fill up vacancies that may happen during the recess of the senate. Whether the president can create an office and fill it during the recess of the senate, seems to have been much questioned.”).

<sup>70</sup> See, e.g., 1 Stat. 627, 627, 639 (1799) (regulating “the collection of duties on imports and tonnage” by dividing the nation into districts and providing that “the President of the United States may, and he is hereby empowered to make. . . appointments [of surveyors and collectors to each of those districts] during the recess of the Senate, by granting commissions, which shall expire at the end of their next session”); 2 Stat. 608, 608 (1810) (providing for the compensation of public ministers and permitting compensation to those individuals confirmed by the Senate as well as those individuals recess appointed by the President, without regard to whether the recess appointments were made to newly created or previously occupied positions).

<sup>71</sup> See, e.g., THOMAS SERGEANT, CONSTITUTIONAL LAW 373 (2d ed. 1830) (describing such a debate over an 1822 appropriations bill to which an amendment was offered that would have provided “that the president should not appoint any minister. . . but with the advice and consent of the senate”).

<sup>72</sup> See, e.g., *id.* (noting that the above-mentioned amendment was later withdrawn as a result of the “sense of the senate” that it is “only in offices that become vacant during the recess, that the president is authorised to exercise the right of appointing to office, and that in original vacancies where there has not been an incumbent of the office, such a power under the constitution does not attach to the executive”).

those appointments that, in their view, exceeded the President's constitutional powers.<sup>73</sup>

Such disputed appointments were not infrequent. Indeed, four of the first five Presidents (George Washington, John Adams, James Madison, and James Monroe) faced at least one major conflict with Congress over recess appointments to newly created offices, or avoided such conflict by foregoing recess appointments on the counsel of their advisors.

### B. *The Washington Administration*

The first executive branch official to formally consider the meaning of "vacancy" within the context of the Recess Appointments Clause was Attorney General Edmund Randolph. Like a number of early executive appointees, Randolph argued for an expansive definition of the term. But it does not appear that President Washington embraced this broad definition.

In April 1792, just four years after Randolph's native Virginia voted to ratify the Constitution, Congress authorized the creation of the U.S. Mint.<sup>74</sup> However, when the Senate concluded its session that May, the newly created office of the Chief Coiner remained unfilled.<sup>75</sup> Thomas Jefferson, the President's Secretary of State, sought Randolph's opinion on whether the President might make a recess appointment to that office.<sup>76</sup> Randolph responded, "An office is vacant when no officer is in the exercise of it. So that it is no less vacant when it has never been filled up, than it is upon the death or resignation of an Incumbent."<sup>77</sup> On that basis, Randolph declared the Office of Chief Coiner to be vacant.<sup>78</sup> Nonetheless, he found that the

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<sup>73</sup> See, e.g., 26 ANNALS OF CONG. 748 (1814) (recounting the testimony of Senator Christopher Gore, who contended that the recess appointment of an individual to an original vacancy was unconstitutional and argued that his interpretation had been "confirmed by repeated acts of Congress, authorizing the President to appoint to offices, that were created during the session of the Senate, and remained vacant until the recess commenced" since such acts "would have been unnecessary if the President, Senate, and House of Representatives, had not concurred in opinion that the offices must have been before full, to have vested a power in the President to fill up vacancies during the recess"); Executive Proceedings (Apr. 13, 1821), in NILES' WEEKLY REGISTER (Aug. 24, 1822), reprinted in 22 THE WEEKLY REGISTER 418, 420 (H. Niles ed., 1822) (reporting the finding of the Senate Committee on Military Affairs that "many instances have occurred where offices have been created by law, and special power was given to the president to fill those offices in the recess of the senate; and no instance has before occurred. . . where the president has felt himself authorized to fill such vacancies without special authority by law").

<sup>74</sup> Rappaport, *supra* note 37, at 1518–19.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1518.

<sup>77</sup> Randolph, *supra* note 46, at 166.

<sup>78</sup> *Id.*

President could not fill the vacancy, as it did not “happen” during the recess of the Senate.<sup>79</sup>

As the appointment was never made, it is unclear from this incident whether Washington concurred with his Attorney General’s interpretation of the term “vacancy” or merely concurred with his interpretation of “may happen.” However, a related incident indicates Washington’s discomfort with the idea of making recess appointments to newly created offices.

Just one month after Randolph tendered his opinion on recess appointments, Washington was asked whether he might appoint an individual to the position of “Inspector of the Survey,” which had been “newly constituted in Maryland.”<sup>80</sup> Washington responded that recess appointments to new positions should only be made where the “propriety” of such appointments “was apparent.”<sup>81</sup> He was explicit in describing the conditions of apparent propriety: “[T]he Attorney General should be of the opinion that The President of the United States has power under [an Act of Congress]” to make such an appointment.<sup>82</sup> Like early Congresses,<sup>83</sup> it therefore appears that Washington believed that the President could not make recess appointments to newly created positions on the basis of his constitutional powers alone. Instead, he could only do so following a grant of statutory authority from Congress.

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<sup>79</sup> *Id.* at 166–67; *see also supra* Part I.B.1 (detailing Randolph’s interpretation of the “may happen” requirement of the Recess Appointments Clause).

<sup>80</sup> Letter from George Washington to Alexander Hamilton (Aug. 5, 1792), in 12 THE PAPERS OF ALEXANDER HAMILTON 166, 166 (Harold C. Syrett ed., 1967).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* As Revenue Commissioner Tench Coxe explained in a letter to George Gale, who was serving as revenue supervisor of Maryland, the appointment of a new revenue officer had been delayed because the statutory authority conveying to the President the power to make such appointments had expired. He explained that “this being a new office created by the President it is conceived that he cannot fill it by his ordinary power of appointment, which is applicable only to vacancies in preexistent offices created by law occasioned by the Death &c in the Recess of the Senate.” *Id.* at 168 n.3 (quoting Letter from Tench Coxe to George Gale (Aug. 20, 1792)). It should be noted that, contrary to Washington’s own assertion, he did make certain recess appointments to offices perhaps rightly characterized as newly created offices. *See* Hartnett, *supra* note 50, at 385 (describing recess appointments that Washington made to newly created judgeships). However, a closer examination of the facts may explain why Washington believed these recess appointments to be proper. Washington initially had nominated and the Senate had confirmed an appointee to each of the judgeships in question, at which point Washington treated the newly created office as once-filled. *Id.* When the President’s appointees subsequently declined to serve, he treated the refusals as resignations and felt free to then fill the offices with recess appointees. Rappaport, *supra* note 37, at 1522.

<sup>83</sup> *See supra* notes 70–73 and accompanying text (describing congressional debate on the question of whether to extend to the President statutory authority to make recess appointments to newly created positions).

Still, at least one scholar has suggested that Washington's recess appointments of diplomatic officers to newly created positions belied his apparent deference to congressional authority on the question of recess appointments.<sup>84</sup> Drawing upon these appointments, Professor Rappaport asserts that Washington did, in fact, adhere to the view that a "vacancy" inheres in an office from the moment of its creation, thus allowing the President to make recess appointments to newly created offices on the basis of his constitutional powers.<sup>85</sup>

But this claim overlooks the fact that both Washington's Secretary of State and, later, proponents of a limited Recess Appointments Clause argued that Congress had provided advance authorization for the diplomatic appointments at issue.<sup>86</sup> The Secretary of State's emphasis on evidence of congressional authorization indicates that early American officials believed that the constitutional case for making recess appointments to newly created offices

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<sup>84</sup> See Rappaport, *supra* note 37, at 1528.

<sup>85</sup> See *id.* ("The Washington Administration appeared to reject [the] previously occupied interpretation, as it made recess appointments to newly created diplomatic offices."). Specifically, it appears that Professor Rappaport refers to the recess appointments of Thomas Barclay to be Consul to Morocco, in 1791, and of John Paul Jones to be Minister Plenipotentiary and Consul to Algiers, in 1792. *See id.* at 1528 n.117 (citing 2 AMERICAN STATE PAPERS: MISCELLANEOUS 242–44 (1834) (charting recess appointments of early public ministers, including those at issue here, and noting whether the office to which they were appointed had been previously filled)).

<sup>86</sup> See, e.g., 26 ANNALS OF CONG. 752 (1814) ("In 1790. . . our affairs at Morocco were in an unsettled state. The whole subject was submitted to the Senate by President Washington, whereupon. . . [a Senate committee] authorized the President to take measures for confirming the [U.S.-Morocco] treaty. . . and Mr. Barclay. . . received the appointment. . . for the purpose enjoined by the Senate." (statement of Sen. Christopher Gore)); Letter from Thomas Jefferson to John Paul Jones (June 1, 1792), in THE PAPERS OF THOMAS JEFFERSON, *supra* note 46, at 3, 5 ("In 1790[,] this subject was laid before Congress fully, and at the late session, monies have been provided, and authority given to proceed to the ransom of our captive citizens at Algiers. . . And in consequence of these proceedings, your mission has been decided on by the President."). Regarding the assertion of prior congressional authorization, it should be noted that early Congresses and Presidents alike treated diplomatic offices somewhat differently than domestic offices. Rappaport, *supra* note 37, at 1526–27. Diplomatic appointments were not conceived of as offices created exclusively by federal law, but rather as offices whose creation was implicitly authorized by the Constitution and/or international law. *Id.* at 1526. During the Washington Administration, Congress did not enact statutes creating diplomatic offices, but merely appropriated undifferentiated monies to be spent on such diplomatic positions as the President might see fit to create. *Id.* at 1527. Since congressional approval of diplomatic appointments was typically conveyed more generally than its authorization of domestic appointments during the Washington Administration, it might also be said that congressional authorization of preliminary recess appointments to such positions was made more generally. See CONG. RESEARCH SERV., 77-500 PS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 529–33 (2002) (noting that throughout American history Presidents have made appointments of diplomatic agents in apparent contravention of the advice-and-consent process, and explaining this pattern as the result of the oddities of such offices).

absent congressional authority was shaky at best. During the Washington Administration, congressional concurrence on appointments to newly created offices was thought to be constitutionally advisable, if not constitutionally required. Yet this view would not always endure in the White House.

John Adams, Washington’s immediate successor, took a broader view of the recess appointment power. However, his view would generate opposition both within and outside of his administration.

### C. *The Adams Administration*

On March 3, 1799, Congress enacted a law authorizing the President “to make appointments to fill any vacancies in the army and navy which may have happened during the present session of the Senate.”<sup>87</sup> That same day, the Speaker of the House thanked the Members of Congress then gathered in Philadelphia and adjourned the session.<sup>88</sup> The Senate followed suit shortly thereafter, and its members returned to their home states.<sup>89</sup> Congress would not reconvene for nine months.<sup>90</sup>

In the first weeks of the recess, President Adams wrote to his Secretary of War, James McHenry, regarding the commissioning of new army officers.<sup>91</sup> As one of the suggested commissions was to a newly created office, McHenry sought the advice of Alexander Hamilton, a notable Founding Father and an author of the Federalist Papers, on whether a recess appointment would be valid.<sup>92</sup> He asked “[w]hether Offices, created, during the late session of the senate, and not then filled by appointments, by and with their advise and consent, can now be considered, as offering vacancies.”<sup>93</sup> Hamilton replied to McHenry that

*Vacancy* is a relative term, and presupposes that the Office has been once filled. If so, the power to fill the Vacancy is not the power to make an original appointment. The phrase “Which may have happened” serves to confirm this construction. It implies casualty—and

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<sup>87</sup> 1 Stat. 749, 749 (1799).

<sup>88</sup> H. JOURNAL, 5th Cong., 3d Sess. 517–19 (1799).

<sup>89</sup> S. JOURNAL, 5th Cong., 3d Sess. 608, 611 (1799).

<sup>90</sup> See H. JOURNAL, 6th Cong., 1st Sess. 523 (1799) (noting that the members of the Sixth Congress took their seats on December 2, 1799); S. JOURNAL, 6th Cong., 1st Sess. 3 (1799) (noting that the Senate reconvened the same day).

<sup>91</sup> See Letter from John Adams to J. McHenry (Mar. 29, 1799), in 8 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 629, 629–30 (Charles Francis Adams ed., 1853) (detailing the protocol for appointing such officers and recommending three candidates in particular).

<sup>92</sup> Letter from James McHenry to Alexander Hamilton (Apr. 26, 1799), in 23 THE PAPERS OF ALEXANDER HAMILTON 69, 69 (Harold C. Syrett ed., 1976).

<sup>93</sup> *Id.* at 71.

denotes such Offices as having been once filled, have become vacant by accidental circumstances.<sup>94</sup>

That being the case, Hamilton declared, President Adams was not empowered to make recess appointments to newly created officerships<sup>95</sup>—the appointments would have to wait until the Senate returned the following winter to offer their advice and consent.

McHenry conveyed Hamilton's opinion to President Adams in early May.<sup>96</sup> However, Hamilton was not the only one consulted regarding the President's recess appointment powers. McHenry also conveyed to the President the opinion of Attorney General Charles Lee, who offered a more expansive interpretation of the term "vacancy." Confining his advice to statutory interpretation, Lee suggested that the terms of the Act authorizing the President to fill army vacancies were "large enough to embrace old officers in the army and navy . . . and also to embrace new offices created during the session which had never been filled but remained vacant."<sup>97</sup> This relatively conservative advice, which relied on the statute rather than the Constitution for authorization to make the recess appointment, would not have been out of place in the Washington Administration,<sup>98</sup> nor does it appear aimed at expanding the President's unilateral recess appointment power.

Despite this advice, President Adams adopted an expansive view of his constitutional power. In response to McHenry, Adams wrote that his "claim of . . . authority" to fill the newly created officership with a recess appointment was grounded not in the recent act of Congress, but in the Constitution: "Whenever there is an office that is not full, there is a vacancy, as I have ever understood the Constitution. . . . I have no doubt that it is my right and my duty to make the provisional appointments."<sup>99</sup>

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<sup>94</sup> Letter from Alexander Hamilton to James McHenry (May 3, 1799), in *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 92, at 94, 94.

<sup>95</sup> *Id.*

<sup>96</sup> See *id.* at 95 n.2 (explaining that McHenry quoted Hamilton's letter but did not enclose the excerpt in quotation marks or attribute it to Hamilton).

<sup>97</sup> *Id.* (quoting Letter from James McHenry to John Adams (May 7, 1799)).

<sup>98</sup> See *supra* note 82 (describing President Washington's emphasis on the necessity of congressional approval before filling newly created offices by recess appointment).

<sup>99</sup> Letter from John Adams to J. McHenry (Apr. 16, 1799), in *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES*, *supra* note 91, at 632, 632–33. The appointments were described as "provisional" because the commissions, like all recess appointments, would expire at the end of the Senate's next session and, upon nomination, would then be subject to Senate approval or disapproval.

Despite President Adams’s surety, it does not appear that the controversial recess appointment was ever made.<sup>100</sup> Accordingly, the President was never forced to defend his view to the Senate or others. Whether the President shied away from the controversy that such an appointment would generate or simply changed his mind for other reasons, the tradition of deference to Senate advice and consent on nominations to newly created offices persisted through the Adams Administration. James Madison would break that tradition.

#### D. *The Madison Administration*

In June 1812, the United States and Great Britain went to war.<sup>101</sup> One year later, in an effort to bring about an end to hostilities between the two countries, Madison offered recess appointments to Albert Gallatin, John Quincy Adams, and James Bayard to the specially created positions of Envoys Extraordinary and Ministers Plenipotentiary, with the objective of negotiating a peace treaty.<sup>102</sup> When their names were later submitted to the Senate for confirmation, Adams and Bayard were confirmed while Gallatin’s nomination was rejected.<sup>103</sup> However, that vote was only the beginning of the Senate’s discussion of the matter.

Following the confirmation vote, Senator Christopher Gore introduced a motion to censure the President for making what Gore believed to be unconstitutional recess appointments to the newly created positions.<sup>104</sup> With regard to the President’s power “to fill up all vacancies that may happen during the recess of the Senate,” Gore asserted that it should be resolved that “in the opinion of the Senate, no such vacancy can happen in any office not before full.”<sup>105</sup>

Gore made his case to the Senate on February 28, 1814.<sup>106</sup> In a lengthy speech, Gore argued that:

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<sup>100</sup> See Hartnett, *supra* note 50, at 389–90 (citing S. EXEC. JOURNAL, 5th Cong., 3d Sess. 325–26 (1799) (reporting recess appointments but no military appointments)).

<sup>101</sup> See WALTER R. BORNEMAN, 1812: THE WAR THAT FORGED A NATION 1 (2004) (noting that the United States declared war in June 1812).

<sup>102</sup> See Message from James Madison to the Senate (May 29, 1813), in NILES’ WEEKLY REGISTER (Aug. 14, 1813), reprinted in 4 THE WEEKLY REGISTER 377, 377 (H. Niles ed., 1813) (noting that the above individuals were granted recess appointments and formally submitting their names to the Senate for confirmation).

<sup>103</sup> See Executive Proceedings (July 14, 1813), in NILES’ WEEKLY REGISTER, *supra* note 102, at 379, 379 (reporting that the Senate eventually voted on the nominations in July 1813).

<sup>104</sup> See 9 MEMOIRS OF JOHN QUINCY ADAMS 234 (Charles Francis Adams ed., 1876) (noting that Gore first made his motion on July 29, 1813).

<sup>105</sup> 26 ANNALS OF CONG. 651 (1814).

<sup>106</sup> *Id.*

An office is created by the Constitution, or by some law in pursuance thereof. A vacancy may be said to exist in such office, immediately after its creation. Such, however, is not the case provided for by the clause under examination. It is the case of a vacancy that may happen during the recess of the Senate. . . . If a vacancy happen in an office, the office must have been before full; for, to assert that a vacancy has happened, necessarily implies the fact, that such office had previously an incumbent . . .<sup>107</sup>

It appears from his statement that Gore, unlike Hamilton a decade prior, did not think that the meaning of the term “vacancy” was, by itself, necessarily limited to an opening in an office once filled.<sup>108</sup> However, like Hamilton, Gore maintained that even if the term “vacancy” was broad enough to include newly created offices, the Recess Appointments Clause cabins its definition: The Clause refers only to vacancies created by “happenings” beyond the creation of the office in the first instance.<sup>109</sup> In Gore’s opinion, this understanding of the term was critical to the constitutional balance of power because

[w]ere it not for the precision of language used in this grant to the President, and the unavoidable construction thereof, a great and manifest object of the Constitution, viz: the vesting the power of appointment in two great organs of the Government, the President and the Senate, might have been totally defeated, by an assumption of the whole power by the President.<sup>110</sup>

Although it does not appear that the Senate ever adopted Senator Gore’s resolution, contemporary historians characterized its introduction and defense as a protest against executive attempts to enlarge the recess appointment power.<sup>111</sup> James Monroe, Madison’s

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<sup>107</sup> *Id.* at 653–54.

<sup>108</sup> Hamilton believed that phrase simply confirmed the more restrictive meaning of vacancy. *See supra* note 94 and accompanying text (explaining Hamilton’s position).

<sup>109</sup> See Part I.B for a more detailed discussion of the evolving meaning of when vacancies may be said to “happen.” Here, it is enough to note that Senator Gore was primarily concerned that “may happen” *not* be interpreted to mean that vacancies “may happen” merely as a result of the creation of an office. In contrast, one of Gore’s opponents, Senator William Bibb, argued that, “A vacant office is ‘an office unoccupied,’ ‘an office not filled.’ So as soon as an office is created and as long as it exists, it is either vacant or it is full.” 26 ANNALS OF CONG. 698 (1814). Moreover, Bibb argued that an alternative understanding of the Recess Appointments Clause would either mean that the Senate would need to always be kept in session or would result in “injurious delays” caused by the President’s inability to name diplomatic officers during times of recess. *Id.* at 700.

<sup>110</sup> *Id.* at 654.

<sup>111</sup> *See, e.g.*, SERGEANT, *supra* note 71, at 373 (“The principle acted upon in this case. . . was not acquiesced in, but protested against, by the senate at their succeeding session.”); JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 411 (1833) (“The senate. . . are said to have entered a protest against such an exercise of power by the executive.”).

successor, would receive an even stronger rebuke of his asserted appointment authority.

### E. The Monroe Administration

In the spring of 1821, with the War of 1812 six years past and the horizon free of looming hostilities, Congress undertook to reduce the size of the peacetime military establishment. Shortly before recessing, Congress approved an Act reducing the size of the military, reorganizing remaining units, and, as a result of the reorganization, creating a number of new officer positions.<sup>112</sup> During the recess, President Monroe appointed, among others, Nathan Towson and James Gadsden to newly created officerships.<sup>113</sup> When the Senate returned to session, the President submitted their names for confirmation.<sup>114</sup> Both nominations were rejected.<sup>115</sup> The Senate objected that the two men not only failed to meet the qualifications for the positions—namely, that they did not, in the opinion of the Senate, hold the proper military rank prior to their appointments—but also that their recess appointments were improper.<sup>116</sup>

Indignant, President Monroe renominated the two men to the same positions.<sup>117</sup> At the same time, he offered a lengthy defense of the process by which he had arrived at his decision to appoint Towson

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<sup>112</sup> 3 Stat. 615, 615–16 (1821).

<sup>113</sup> See Message from James Monroe to the Senate (Jan. 17, 1822), in NILES’ WEEKLY REGISTER, *supra* note 73, at 406, 406–07 (conveying to the Senate a list of appointees and their appointment dates, which included the dates of Towson and Gadsden’s appointments—June 1, 1821 and August 13, 1821, respectively). Both of these dates fell during a recess of the Senate. See S. EXEC. JOURNAL, 16th Cong., 2d Sess. 256 (1821) (indicating that one session of the Senate concluded on March 3, 1821); S. EXEC. JOURNAL, 17th Cong., 1st Sess. 257 (1821) (indicating that the following session began on December 21, 1821).

<sup>114</sup> See S. EXEC. JOURNAL, *supra* note 113, 266–67 (noting that the list of appointees was submitted for the Senate’s consideration and confirmation).

<sup>115</sup> See Promotions and Appointments in the Army of the United States (Mar. 16, 1822), in NILES’ WEEKLY REGISTER, *supra* note 73, at 407, 408 (cataloging the Senate’s debate and its vote on each of the would-be appointees).

<sup>116</sup> The Senate Committee on Military Affairs held that the President had “no power” and was “not authorized” to make their appointments. *Id.* The committee submitted further that Towson, as Paymaster General of the Army, did not “belong[ ] to any corps of the army,” and thus could not be appointed to an artillery colonelcy under a law intended to reduce the size of the Army, not increase its ranks. *Id.* at 408, 415, 417. And Gadsden, as an Inspector General of the Army, should not have been made Adjutant General when two officers of that rank were dismissed from the army in the reduction. *Id.* at 408.

<sup>117</sup> Message from James Monroe to the Senate (Apr. 12, 1822), in NILES’ WEEKLY REGISTER, *supra* note 73, at 412, 412.

and Gadsden while dismissing other “men of acknowledged merit”—what Monroe termed “a most painful duty.”<sup>118</sup>

The response of the Senate Committee on Military Affairs was even more extensive than the President’s defense. In addition to reiterating its complaints about Towson and Gadsden’s eligibility for the newly created positions at issue, the committee objected to the very fact of the recess appointments:

If the offices to which colonels Towson and Gadsden are nominated were original vacancies created by the act of the 2d March, 1821, the committee contend that they were not filled agreeable to the provisions of the constitution. The words “all vacancies that may *happen* during the *recess* of the senate,” evidently means vacancies occurring from death, resignation, promotion, or removal; the word *happen* must have reference to some casualty not provided for by law.<sup>119</sup>

Notably, although the President did not directly address the issue of the propriety of making recess appointments to original vacancies in his message to the Senate, the Monroe Administration appears to have been aware that such appointments were of dubious constitutionality, or, at the very least, that the Senate would view the appointments as being of dubious constitutionality. In an attempt to address or evade these constitutional concerns, at least with regard to the appointment of Gadsden, Monroe’s Secretary of War John C. Calhoun wrote to Congress that General Henry Atkinson had originally been assigned to the office of the adjutant general.<sup>120</sup> Only when Atkinson refused the position, Calhoun asserted, was Gadsden “appointed by the president to fill the vacancy.”<sup>121</sup> Essentially, the Monroe Administration took the position that, even if no vacancy had

<sup>118</sup> Message from James Monroe to the Senate (Apr. 12, 1822), in NILES’ WEEKLY REGISTER, *supra* note 73, at 409, 409–12. Monroe explained that he had appointed a board of military officers to recommend those individuals to be retained under the organization and had adopted their recommendations. *Id.* at 411. With regard to Towson and Gadsden, he asserted that their “peculiar fitness” for the offices to which they had been appointed ought to “preclude all objection” on account of their credentials. *Id.* Monroe objected to the Senate’s assertion that only individuals of particular prior rank were eligible for the newly created positions. He wrote that, “In filling original vacancies, that is, offices newly created, it is my opinion, as a general principle, that congress have no right, under the constitution, to impose any restraint, by law, on the power granted to the president, so as to prevent his making a free selection of proper persons for these offices from the whole body of his fellow citizens.” *Id.* He did not address the question of the propriety of making recess appointments to new positions generally or defend his decision to do so.

<sup>119</sup> Executive Proceedings (Apr. 13, 1821), in NILES’ WEEKLY REGISTER (Aug. 31, 1822), reprinted in 22 THE WEEKLY REGISTER 418, 420 (H. Niles ed., 1822).

<sup>120</sup> Letter from J.C. Calhoun to William Eustis (Jan. 29, 1822), in NILES’ WEEKLY REGISTER, *supra* note 73, at 413, 413–14.

<sup>121</sup> *Id.* at 413.

existed prior to Atkinson’s refusal of the position, one certainly existed after his refusal, the office having been at least nominally filled by his “arrangement” to it in the interim.

The Senate rejected this argument, noting that Atkinson declined to accept the newly created adjutant general position *before* that board formally “arranged” Atkinson to that position.<sup>122</sup> Given this fact, the Senate Committee on Military Affairs queried, “When it was known, *positively*, that general Atkinson would not accept this office, why was he arranged to it?”<sup>123</sup> The issue was considered important enough that the Committee deposed members of the War Department to inquire as to the timeline of events and sought from them documents that might better illuminate that timeline and the motives of involved parties.<sup>124</sup> The Committee concluded that

[Atkinson’s] arrangement was nominal, and could not have the effect of evading the law, or creating a vacancy which did not before exist. And the committee are of opinion, that the tender of this office to general Atkinson, with a knowledge that he would not accept, did not produce a vacancy . . . .<sup>125</sup>

Following the release of the Committee’s report, the Senate again rejected the nominations of Gadsden and Towson.<sup>126</sup> Both received less support in this second round of voting,<sup>127</sup> indicating that the Senate rebuffed not only the President’s nominees but also his expansive view of the recess appointment power. In so doing, the Senate preserved for itself the power of advice and consent regarding

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<sup>122</sup> See Executive Proceedings (Apr. 13, 1821), in NILES’ WEEKLY REGISTER, *supra* note 119, at 418–19 (noting that Atkinson declined the position—before he was arranged to it—in a letter received by the leader of the board of military officers charged with advising the President in his decisionmaking regarding the required reduction of the Army).

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

<sup>124</sup> See *id.* at 421–23 (cataloging the investigation).

<sup>125</sup> *Id.* at 419 (emphasis added). The committee also expressed its doubts that the position was an original vacancy, as President Monroe claimed. Prior to the law reducing the size of the army, two adjutant general positions existed and were filled by other individuals. *Id.* Monroe insisted that the law eliminated both of those positions and created a new adjutant general position. *Id.* The committee was skeptical of this assertion. See *id.* (finding that “[a]s the object of the act was to reduce the army, and not create offices” the reduction of the two former adjutant generals and the appointment of a new adjutant general may be presumed to be improper). However, given Monroe’s contention that the position was an original vacancy that could be filled with an individual of his choosing, the committee proceeded with its analysis on that assumption. See *id.* at 420 (analyzing the constitutionality of the appointment as though it were to an original vacancy).

<sup>126</sup> Executive Proceedings (Apr. 13, 1821), in NILES’ WEEKLY REGISTER, *supra* note 119, at 418, 423.

<sup>127</sup> In the first round of voting, Towson’s nomination was rejected 19–25. *Id.* at 408. In the second round of voting, Towson’s nomination was rejected 17–25. *Id.* at 423. In the first round of voting, Gadsden’s nomination was rejected 21–23. *Id.* at 409. In the second round of voting, Gadsden’s nomination was rejected 17–25. *Id.* at 423.

nominees to newly created offices, ensuring that any such nominees would need Senate approval before serving in precedent-setting initial appointments.

President Monroe was not the last president to make a recess appointment to a newly created office, nor the last whose appointments to such offices would cause controversy. He was, however, the last of the Founding Fathers to serve in the White House.<sup>128</sup> Taken together, the disputes that took place from the Washington Administration through the Monroe Administration illustrate both the ambiguity in the meaning of a Recess Appointments Clause “vacancy” that existed in early America and the essence of the tension in the Clause—the general constitutional preference for Senate-executive concurrence in appointments on the one hand, and the President’s need to ensure effective execution of the laws on the other. The following Part addresses that tension in the context of the modern era.

### III

#### RECESS APPOINTMENTS CLAUSE “VACANCIES” TODAY

The historical disputes surrounding the Recess Appointments Clause illustrate the view, dominant in early Congresses and held by at least some early executive officials, that the Constitution requires Senate concurrence in appointments to newly created offices. But one might question the relevance of this history. Certainly it sheds light on the way the Clause *was* understood, but does it also reveal how the Clause *should* be understood today? There is, after all, no dispute that the federal government is both different and more complex now than it was at the time of the Founding.

In America’s first fifty years, Congress authorized the creation of just six executive departments: the State Department, the War Department, the Treasury Department, the Office of the Attorney General, the General Post Office, and the Navy Department.<sup>129</sup> Today, executive agencies are manifold, and the executive branch as a whole employs more than 2.7 million people.<sup>130</sup> Charged with

<sup>128</sup> See 1 JOHN R. VILE, THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA’S FOUNDING Ixiii (2005) (noting that Monroe was “the last of the ‘Founding Fathers’” elected President).

<sup>129</sup> See THE PRESIDENT’S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE 31 (1937) (detailing the creation of the Departments of State, War, and Treasury, the Office of the Attorney General in 1789, the creation of the General Post Office in 1794, and the creation of the Navy Department in 1798, and noting that no additional agencies were created until 1849).

<sup>130</sup> Historical Federal Workforce Tables: Total Government Employment Since 1962, U.S. OFFICE OF PERS. MGMT., <http://www.opm.gov/fedata/historicaltables/>

overseeing those employees and implementing the President’s agenda are approximately one thousand presidentially-appointed individuals who require Senate confirmation before taking office.<sup>131</sup> The lengthening delays in confirming these officials<sup>132</sup> are not the result of months-long congressional recesses, as in early America, but, more commonly, partisan political conflict.<sup>133</sup> These changes—both structural and political—illustrate the limits of evaluating the constitutionality of modern recess appointments through the lens of history alone. Accordingly, keeping in mind the nature of today’s government, it is appropriate to explore the practical consequences of narrowly construing the Recess Appointments Clause as it is applied to newly created offices.<sup>134</sup>

The passage of time has not undermined the constitutional logic behind the establishment of a joint Senate-executive appointment process or the logic behind limiting the exceptions to that process.<sup>135</sup>

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totalgovernmentsince1962.asp (last visited Aug. 25, 2012) (noting that the executive branch employed 2.756 million civilians in 2011, the latest year for which data is available).

<sup>131</sup> In 2008, 1141 executive branch appointees required Senate confirmation. Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 926 (2009). In August 2012, President Obama signed the Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283, which reduced the number of executive branch positions requiring Senate confirmation by 169. Ben Jacobs, *Presidential Appointments Bill a Symptom Not a Cure*, WASH. MONTHLY (Aug. 19, 2012, 10:17 AM), [http://www.washingtonmonthly.com/political-animal-a/2012\\_08/presidential\\_appointments\\_bill039310.php](http://www.washingtonmonthly.com/political-animal-a/2012_08/presidential_appointments_bill039310.php); see also Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283.

<sup>132</sup> The time required to fill high-level positions has steadily increased across recent presidential administrations. By one calculation, initial appointees under Presidents George H.W. Bush, Bill Clinton, and George W. Bush waited an average of eight months between Inauguration Day and their Senate confirmation. NAT’L COMM’N ON THE PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 19 (2003). This is a dramatic increase from the average two-month wait of initial Kennedy appointees. *Id.*

<sup>133</sup> Proponents of appointment reform have identified a number of political factors that may have contributed to the increased backlog of presidential nominees and the increased duration of high-level vacancies. These include longer White House vetting periods (possibly in anticipation of more difficult confirmation fights in the Senate) and the effect of divided government. O’Connell, *supra* note 131, at 968, 972.

<sup>134</sup> As Justice Stephen Breyer has written, the Constitution must be applied to modern problems “in light of its purpose” and with an eye to the “consequences” of a given interpretation. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 18 (2005).

<sup>135</sup> See *supra* notes 35–36 (describing the virtue of procuring Senate-executive concurrence on appointees and the limited purpose of the Recess Appointments Clause exception); see also *supra* note 110 and accompanying text (recalling the assertion of Senator Gore that “[w]ere it not for the precision of language used” in the Recess Appointments Clause, “a great and manifest object of the Constitution, viz: the vesting the power of appointment in two great organs of the Government, the President and the Senate, might have been totally defeated, by an assumption of the whole power by the President”).

The fundamental tension underlying the Recess Appointments Clause exception to that process has also not changed. As the Washington Administration realized from the beginning and as the Senate asserted during the Monroe Administration, congressional advice and consent is particularly important with regard to newly created offices, given the ability of appointees to original vacancies to set precedent for their offices and agencies.<sup>136</sup> At the same time, as John Adams noted, the President also has a duty to undertake those actions that are reasonably within his power to promote effective government, including by making recess appointments where authorized.<sup>137</sup>

This Part first examines how courts have handled various challenges to expanding Recess Appointments Clause authority and concludes that the reasons offered for dismissing those challenges would not apply to a suit contesting the appointment of Richard Cordray or any other recess appointee to a newly created position. It then explores the policy reasons favoring a narrow interpretation of the Clause that limits the President's recess appointment authority to previously occupied offices.

#### A. *Judicial Review of the Recess Appointment Power*

The earliest Recess Appointments Clause cases focused on the question of whether the President had the power to make recess appointments to vacancies that happened to exist during the recess of the Senate in addition to those that happened to arise during the recess (he did).<sup>138</sup> More recent cases returned to that question<sup>139</sup> but

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<sup>136</sup> See *supra* Part II.B, II.E (noting that each of the above-named parties rejected the view that a President alone, absent statutory authority, should be able to make a recess appointment to a newly created office).

<sup>137</sup> See *supra* Part I.C (noting that President Adams claimed for himself the right and duty to make recess appointments to newly created offices left empty during a Senate recess).

<sup>138</sup> See *In re Farrow*, 3 F. 112, 115–16 (N.D. Ga. 1880) (upholding the President's recess appointment of a district attorney as constitutional where the vacancy in the district attorney's office did not arise during a Senate recess). *But see In re Yancey*, 28 F. 445, 452 (W.D. Tenn. 1886) (questioning the validity of a recess appointment of a marshal to a vacancy that occurred during a session of the Senate but opting "not to attempt to decide this grave question of constitutional construction" because the court had merely been presented with the issue of whether to administer the marshal's oath of office); *Schenck v. Peay*, 21 F. Cas. 672, 674–75 (E.D. Ark. 1869) (No. 12,451) (finding the recess appointment of a tax commissioner void because the opening in that position "may have existed, but did not happen, during the recess of the senate"); *In re Dist. Attorney*, 7 F. Cas. 731, 736, 744 (E.D. Pa. 1868) (No. 3924) (asserting that the President could not make a recess appointment "if the senate was in session when, or since, the vacancy first occurred," but noting that the question of the propriety of the appointment at issue was not being "directly litigated" and, as such, the court was not empowered to answer it).

<sup>139</sup> See *Evans v. Stephens*, 387 F.3d 1220, 1221–22, 1226–27 (11th Cir. 2004) (upholding the recess appointment of a federal judge to a vacancy that predated the Senate recess);

also addressed whether the President could constitutionally make recess appointments to the judicial branch (he could)<sup>140</sup> and whether appointments made during an intrasession recess were constitutional (they were).<sup>141</sup>

In the majority of the above-cited controversies, and in nearly all of the modern cases, petitioners have argued unsuccessfully for a narrow interpretation of the Recess Appointments Clause.<sup>142</sup> In each case, long-standing executive practice and decades of legislative acquiescence weighed heavily against the narrow interpretation.<sup>143</sup> But prior difficulty in arguing for a restrictive reading of the President’s recess appointment power does not mean that advocates for a limited reading of the term “vacancy” would be stymied by the same issues.

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United States v. Woodley, 751 F.2d 1008, 1010 (9th Cir. 1985) (same); United States v. Aloco, 305 F.2d 704, 706, 709–15 (2d Cir. 1962) (same).

<sup>140</sup> See *Evans*, 387 F.3d at 1223 (“The text of the Recess Appointments Clause refers specifically to ‘all’ vacancies: we accept that the Clause does not leave out Article III judicial vacancies.”); *Woodley*, 751 F.2d at 1011–12 (examining the practical and historical evidence in favor of recognizing the President’s power to make judicial appointments during the recess of the Senate); *Aloco*, 305 F.2d at 708 (addressing the claim that “the President may not appoint judges except by nomination, and by and with the advice and consent of the Senate”).

<sup>141</sup> See *Evans*, 387 F.3d at 1224–25 (“[W]e accept that ‘the Recess,’ originally and through today, could just as properly refer generically to any one—intersession or intrasession—of the Senate’s acts of recessing. . . .”); see also *Nippon Steel Corp. v. U.S. Int’l Trade Comm’n*, 239 F. Supp. 2d 1367, 1374 n.13 (Ct. Int’l Trade 2002) (upholding a recess appointment to the International Trade Commission when that appointment was made during an intrasession recess); *Gould v. United States*, 19 Ct. Cl. 593, 595–96 (1884) (evaluating the pay due to an Army officer for the period between his recess appointment and the Senate’s rejection of his nomination, and finding that his appointment during a temporary adjournment was appropriate, although that question was unnecessary to the resolution of the case).

<sup>142</sup> Breaking with the decisional trend, the D.C. Circuit recently invalidated President Obama’s recess appointments to the National Labor Relations Board. *Canning v. NLRB*, No. 12-1115, 2013 U.S. App. LEXIS 1659, at \*45 (D.C. Cir. Jan. 25, 2013). The court held that “the Recess,” as used in the Recess Appointments Clause, refers only to intersession recesses and that only appointments made therein will constitute valid recess appointments. *Id.* In addition, although not necessary to the decision at hand, the court asserted that only vacancies actually arising during the intersession recess could be filled by the President through his constitutional recess appointment power. *Id.* at \*60–61. However, this decision is very recent and may still be reviewed by the circuit sitting en banc or by the Supreme Court.

<sup>143</sup> See *Evans*, 387 F.3d at 1223, 1226 (reviewing the long-standing practices of making recess appointments to the judiciary and of making recess appointments during intrasession recesses); *Woodley*, 751 F.2d at 1010, 1013 (reviewing the historical evidence in favor of allowing recess appointments to the judiciary and of allowing recess appointments to vacancies that predated the recess in which they were filled); *Aloco*, 305 F.2d at 713–15 (describing executive memoranda regarding the President’s recess appointment powers and noting that Congress had “implicitly recognized the President’s power to fill vacancies which arise when the Senate is in session”); *In re Farrow*, 3 F. at 114 (noting the long-standing executive practice of filling, by recess appointment, vacancies that existed during the session of the Senate and were still unfilled at the time of a recess).

First, the Senate cannot be said to have acquiesced to an interpretation of the Recess Appointments Clause granting the President the power to make recess appointments to newly created offices—the occasion for such appointments has simply been too rare.<sup>144</sup> Second, the Executive seems to have overlooked, at least with regard to the Cordray appointment, the possibility that the Recess Appointments Clause does not empower the President to fill newly created offices through recess appointments.<sup>145</sup> In addition, although no modern court has taken up the question of whether the Recess Appointments Clause empowers the President to make appointments to newly created offices, a federal court at one time answered this question in the negative—basing its decision, in part, on legislative and executive findings that unilateral recess appointments to newly created positions are unconstitutional.<sup>146</sup>

Given the continuing uncertainty surrounding presidential reliance on the Recess Appointments Clause for the authority to make appointments to newly created positions, and because a federal decision holds appointments made on that authority to be unconstitutional, the issue is ripe for judicial review. Such review would not be out of step with federal courts' tradition of addressing Recess Appointments Clause issues.<sup>147</sup> And a judicial ruling on the scope of

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<sup>144</sup> See *supra* notes 21–23 and accompanying text (discussing modern recess appointments to newly created offices before the Cordray appointment).

<sup>145</sup> See 2012 OLC Opinion, *supra* note 58, at 1 (sanctioning recess appointments in spite of the pro forma sessions and noting simply that the Recess Appointments Clause conveys to the President the “power to fill vacant offices” without defining the term “vacant”). *But see* Recess Appointments During an Intratession Recess, 16 Op. O.L.C. 15, 16–17 (1992) (asserting that a newly created office was “vacant for purposes of the Recess Appointments Clause” and citing a series of nineteenth-century Attorney General opinions asserting the same position, but not analyzing the topic further).

<sup>146</sup> See *Schenck v. Peay*, 21 F. Cas. 672, 675 (E.D. Ark. 1869) (No. 12,451) (citing the opinion of one Attorney General that “where offices are created by law taking effect during the session of the senate, and no nominations are made,” “they cannot be filled by executive appointments in the recess of the senate” and noting skepticism on the part of the Senate that newly created offices could be filled by recess appointments); *see also supra* note 61 (discussing the *Schenck* case more fully). In *Allococo*, the Second Circuit mentioned the issue, noting that a number of Attorneys General had opined that the President had the power to make recess appointments to newly created offices, but, because the case did not concern a newly created office, this observation did not form the basis for the court’s decision and was not explored further. See *Allococo*, 305 F.2d at 705, 713 (describing the resignation of the former occupant of the office under consideration and detailing the court’s observation).

<sup>147</sup> Although at first it might seem that questions regarding presidential appointments are inherently political, no federal court has ever found that a controversy rooted in the Recess Appointments Clause, by its very nature, raises political questions outside the scope of judicial review. See *CARPENTER ET AL.*, *supra* note 24, at 12 (“[N]o court has held that the Recess Appointments Clause, by its very subject matter, precludes judicial review.”).

the Clause would offer Senate and executive actors the guidance needed to ensure that future appointees, once in office, stand on sound constitutional footing.<sup>148</sup>

### B. The Policy Benefits of a Narrow Interpretation

The Recess Appointments Clause is not (and was not intended to be) a nomination-and-confirmation cure-all.<sup>149</sup> A narrow construction of the Recess Appointments Clause—one that restricts the President’s appointment power to previously occupied offices—would align most closely with the spirit of the Constitution, which sought to promote Senate-executive cooperation in appointments whenever possible.<sup>150</sup>

The Recess Appointments Clause has traditionally been construed in light of that collaborative goal. For example, the Senate and the Executive have both interpreted a “recess” within the meaning of the Clause to hinge on the availability of the Senate to consult with the President regarding his nominees, rather than focusing on, for example, the length or particular type of recess.<sup>151</sup> When the Senate is able to advise the President, he cannot circumvent their consent by use of the Recess Appointments Clause—illustrating the constitutional preference for a joint Senate-executive effort to fill key offices.

Such a joint effort is particularly important with regard to newly created offices and agencies. Advice and consent in that context respects the balance that our system of government values: It ensures that the Senate and the President collaborate not only in the creation of new offices and agencies, but also that they confer regarding those individuals charged with translating the legislative and executive

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<sup>148</sup> Potentially unconstitutional appointments create uncertainty because, if the appointment of agency leadership is found to be unconstitutional, agency decisions may become subject to additional scrutiny or set aside altogether. For example, the Supreme Court in *New Process Steel v. NLRB* “nullified more than two years’ worth of National Labor Relations Board decisions” after the Court determined that “the board lacked a quorum of members during that period as required under the statute.” Alexander I. Platt, Note, *Preserving the Appointments Safety Valve*, 30 YALE L. & POL’Y REV. 255, 257–58 (2011) (citing 130 S. Ct. 2635 (2010)). Ostensibly, a court could find that such a board lacked a quorum if it determined that one of the board members was seated unconstitutionally.

<sup>149</sup> See *supra* note 36 and accompanying text (noting the limited purposes for which it was expected that the Recess Appointments Clause would be used).

<sup>150</sup> See *supra* note 35 and accompanying text (describing the general advice-and-consent process and its perceived advantages).

<sup>151</sup> See S. REP. No. 58-4389, at 2 (1905) (asserting that “recess,” as used in the Recess Appointments Clause, means “the period of time when. . . because of [the Senate’s] absence, it can not receive communications from the President or participate as a body in making appointments”); 2012 OLC Opinion, *supra* note 58 at 12–13 (describing S. REP. No. 58-4389 as an “authoritative source” on the meaning of a recess and concluding that the President may only make recess appointments “when he determines that, as a practical matter, the Senate is not available to give advice and consent to executive nominations”).

vision for their offices into a reality. Thus, for the same reason that the Recess Appointments Clause preserves the general appointment method when the Senate is available to consult with the President, so too does it preserve, without exception, the right of the Senate to advise the President in his appointments to newly created offices by limiting his appointment authority to “vacancies” (openings in previously occupied offices) or, by a similar reading, to “vacancies that may happen” (by the death, resignation, or other cause beyond the mere creation of the office). A more expansive reading of the Clause would discourage moderation and consensus when it is needed most, as the first person to hold an office is certain to leave an outsized imprint on the federal government by setting precedent for the newly created office.<sup>152</sup>

In addition, limiting the President’s recess appointment power would promote democratic engagement with the appointment process. When recess appointees fill newly created offices, public accountability and engagement are minimized.<sup>153</sup>

Different views regarding appointments to newly created offices—and the role those offices should play in the federal government—ought to be hashed out in the public eye. By increasing the political cost of holding up nominees, a public debate could help to ensure that only those newly created offices about which there are genuine ideological differences go unfilled.<sup>154</sup> In addition, taking the recess appointment option off the table in the case of newly created offices would promote a public dialogue around those differences.<sup>155</sup>

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<sup>152</sup> See Pamela C. Corley, *Avoiding Advice and Consent: Recess Appointments and Presidential Power*, 36 *PRESIDENTIAL STUD.* Q. 670, 678 (2006) (concluding, following an analysis of traditional and recess appointments to independent agencies, that popular Presidents who face opposition to their choices in the Senate are the most likely to make recess appointments and describing their doing so as “evading an important check on [the President’s] authority” that increases presidential control over the shape of federal bureaucracy at the expense of Congress).

<sup>153</sup> See Brian C. Kalt, *Politics and the Federal Appointments Process*, HARV. L. & POL’Y REV. ONLINE (Apr. 5, 2011), <http://hlpronline.com/2011/04/politics-and-the-federal-appointments-process/> (“When senators block a nominee fairly noiselessly, without a vote, and then Presidents are quick to act unilaterally and bypass the system with an acting or recess appointment, there is no engagement . . . .”).

<sup>154</sup> See *id.* (noting that the political costs of behind-the-scenes conflict—such as a filibuster of a nominee or a recess appointment—are low, increasing the likelihood of conflict for conflict’s sake, and asserting, on the other hand, that “[w]hen each side conducts itself in a noisy way [through the traditional advice-and-consent process]—a way that conveys information to the other side and to the public—the cost of pointless obstruction becomes too high to sustain”).

<sup>155</sup> This consequence may be properly considered in interpreting the Clause. See BREYER, *supra* note 134, at 3–12 (advocating an approach to constitutional interpretation that emphasizes the Constitution’s “democratic objective” and promotes “active liberty,” which Breyer describes as “the scope of the right to participate in government”). If the

A need to persuade the public of the wisdom of each appointment, or the lack thereof, would incentivize both the White House and the Senate to share more information with the public concerning their beliefs as to the nominee’s qualifications for the job and how he or she ought to exercise the power of the new office.

Still, in light of the protracted and dysfunctional process of advice and consent that has become routine among high-level appointments,<sup>156</sup> it is tempting to suggest that the Recess Appointments Clause be interpreted broadly, so that it may serve as a tool by which the President can ensure a functioning executive branch. Indeed, the recess appointment power has recently been described as “a constitutional safety valve—relieving the pressure of mounting vacancies and ensuring that the President has the ability to take care that the laws are faithfully executed.”<sup>157</sup> However, with respect to newly created offices, there may be a presumption that the delay required to obtain Senate advice and consent regarding potential nominees would not “paralyze” the existing federal government, to borrow language from Attorney General Wirt,<sup>158</sup> but instead would simply delay implementation of a new aspect of it.<sup>159</sup>

## CONCLUSION

The Recess Appointments Clause should be read to empower the President to fill only those offices previously occupied and then made vacant by the death or departure of their occupants. Furthermore, any

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recess appointment option is taken off the table, Senators might still be tempted to use behind-the-scenes efforts to prevent the President’s nominee from receiving a proper vote. But that would not necessarily defeat public debate. A White House concerned about the need to fill a newly created office would then have no choice but to make its case to the public, facilitating informed citizen participation in the appointment process.

<sup>156</sup> See *supra* notes 132–33 and accompanying text (describing the increased backlog in confirming nominees to high-level positions).

<sup>157</sup> Platt, *supra* note 148, at 258. Platt suggests that the “safety valve” should be preserved by a declaration that pro forma Senate sessions are unconstitutional. *Id.* at 258–59. Recess appointments made in spite of those sessions arguably have rendered moot the need for such a declaration. But Platt’s broader point—that the President should have a means to fill important executive branch positions when the Senate will not do so—endures.

<sup>158</sup> See *supra* note 54 and accompanying text (describing Wirt’s opinion on the scope of the President’s recess appointment authority).

<sup>159</sup> In fact, if a jumpstart of the new office or agency was needed, Congress could always ensure that no delay would result from the congressional schedule by prioritizing confirmation proceedings and by granting the President statutory authority to make a recess appointment to the newly created position in the event that it was not filled prior to a congressional recess. See Rappaport, *supra* note 37, at 1512, 1514 (noting that Congress could convey to the President the power to fill inferior offices unilaterally or could provide for an acting appointment to a newly created office until a permanent appointee could be confirmed).

judicial evaluation of the Cordray appointment should address the meaning of the term “vacancy” within the Recess Appointments Clause in order to provide clarity. Interpreting the term to exclude newly created positions would not only be true to the plain text and historical understanding of the Clause but would also promote constitutionally favored Senate-executive collaboration in the appointment of those individuals given the weighty task of translating a statutory blueprint into a new office or agency.

The opportunity for judicial resolution may come soon. Already, plaintiffs have filed suit challenging the actions of the CFPB, claiming, among other things, that President Obama’s recess appointment of Richard Cordray was unconstitutional.<sup>160</sup> Although the suit challenges the Cordray appointment based on the claim that the Senate was not in recess at the time of his appointment,<sup>161</sup> the case could serve as a blueprint for future suits contesting the President’s appointment of Cordray to an office that was not, for the purposes of the Recess Appointments Clause, vacant. The plaintiffs in the pending case seek, among other things, to enjoin Cordray from carrying out any of the powers delegated to the Director of the CFPB.<sup>162</sup> If the suit is successful, it will likely cause substantial uncertainty within the CFPB and among regulated entities as to the legality of the agency’s prior actions, and call into question the acting powers of the agency moving forward. However, as a result of this controversy, courts could also offer a clearer delineation of the boundaries of the President’s recess appointment power and the collaboration expected between the President and the Senate with regard to newly created offices. The chance to do so should not be lost.

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<sup>160</sup> Brief for Petitioner at 3, *State Nat'l Bank of Big Spring v. Geithner*, No. 1:12-cv-01032-ESH (D.C. Cir. June 21, 2012).

<sup>161</sup> *Id.* at 19.

<sup>162</sup> *Id.* at 30.