

Yeshiva University, Cardozo School of Law

LARC @ Cardozo Law

Articles

Faculty

1-2005

Abandoning Recess Appointments: A Comment on Hartnett (and Others)

Michael Herz

Benjamin N. Cardozo School of Law, herz@yu.edu

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-articles>



Part of the [Law Commons](#)

Recommended Citation

Michael Herz, *Abandoning Recess Appointments: A Comment on Hartnett (and Others)*, 26 *Cardozo Law Review* 443 (2005).

Available at: <https://larc.cardozo.yu.edu/faculty-articles/75>

This Article is brought to you for free and open access by the Faculty at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact larc@yu.edu.

ABANDONING RECESS APPOINTMENTS?: A COMMENT ON HARTNETT (AND OTHERS)

*Michael Herz**

INTRODUCTION

The Recess Appointments Clause occupies an interesting niche in constitutional law. In terms of importance and vagueness—the two essential ingredients of controversy and scholarly attention—it falls far shy of, for example, the Due Process Clause. On the other hand, it does not suffer from the irrelevance or the precision that have doomed the title of nobility prohibitions or the requirement that the president be thirty-five years old to the Siberia of constitutional discourse. There are stakes, but they are not too high; there is substantial text to work with, but no shortage of interpretive issues. In considering the scope of the clause, moreover, one is perforce behind a sort of Rawlsian veil of ignorance. A given interpretation may be good for your team at one point in history and bad at another. Therefore, ideology and the appeal of desired outcomes in the short-term can more easily be set aside here than when considering many substantive constitutional issues.

For all these reasons, it may be especially useful to consider questions of interpretive methodology in this setting. Such is the purpose of this brief comment. In particular, I will discuss the role of arguments based on purpose in interpreting the Recess Appointments Clause. I will focus on two important recent articles: that by Edward Hartnett in the current volume,¹ and Michael Rappaport's recent article on the original meaning of the clause.²

* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University.

¹ Edward Hartnett, *Recess Appointments of Article III Judge: Three Constitutional Questions*, 26 CARDOZO L. REV. 377 (2004).

² Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. (forthcoming 2005), available at http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=601563. Professor Rappaport presented a version of this paper at the Benjamin N. Cardozo School of Law's *Jurocracy and Distrust* symposium, March 2004, where I commented on Professors Hartnett and Rappaport's presentations.

I. READING THE RECESS APPOINTMENTS CLAUSE IN LIGHT OF ITS
PURPOSE

The explanation for the Recess Appointments Clause is not complex. The clause represents a minor and pragmatic adjustment to the basic appointments procedure, added to account for a particular set of circumstances. The Constitution requires Senate confirmation for certain appointments, but the Senate is not always available to perform that function. If the Senate is not around, the Recess Appointments Clause authorizes the president to make temporary appointments without Senate approval. Allowing the president to proceed without the Senate ensures the continued smooth functioning of the federal government; making the appointment temporary ensures that the Senate maintains its position within the constitutional scheme.³ As Alexander Hamilton wrote in *The Federalist*:

The relation in which [the recess appointments] clause stands to the [previous clause], which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. The ordinary power of appointment is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments “during the recess of the Senate, by granting commissions which shall expire at the end of their next session.”⁴

This understanding of the clause’s purpose seems self-evident and has never really been questioned.⁵ The many Attorney General

³ See, e.g., Henry B. Hogue, *The Law: Recess Appointments to Article III Courts*, 34 PRESIDENTIAL STUD. Q. 656, 657 (2004) (“[T]he clause was meant to allow the president to maintain the continuity of administrative government through the temporary filling of offices during periods when the Senate was not in session, at which time his nominees could not be considered or confirmed.”).

⁴ THE FEDERALIST NO. 67, at 409-10 (Alexander Hamilton) (Clinton Rossiter ed. 1961). This excerpt is part of a discussion in which Hamilton rebuts the (far-fetched) claim that the clause gave the president power to fill empty seats in the United States Senate. But for the need for this rebuttal, apparently *The Federalist* would never have mentioned the Recess Appointments Clause. In such silence it would have joined the delegates at Philadelphia; they engaged in no recorded discussion of the clause.

⁵ See, e.g., 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1551 (1833) (noting that the Recess Appointments Clause serves “convenience, promptitude of action, and general security” and avoids the burden of having the Senate “perpetually in session” so as to act on the

opinions concerning the clause operate from the premise that its purpose is to prevent disruptive delays in filling vacancies.⁶ Since the clause concerns the allocation of constitutional authority, and since its purpose is sensible, straightforward, and unquestioned, this is an ideal setting for what Charles Black termed “arguments from structure and relationship.”⁷ Interestingly, such arguments play out quite differently with regard to the three basic and recurring issues about the scope of the clause: when must the vacancy arise?; what counts as a recess?; and can the president make a recess appointment of an Article III judge?

A. *When Must the Vacancy Arise?*

The Recess Appointment Clause applies to “vacancies that may happen during the recess of the Senate.”⁸ The usual reading, endorsed by Professor Hartnett, is that the clause applies when a vacancy *exists* during a recess, regardless of when it *arose*.⁹ After exhaustive consideration, however, Professor Rappaport concludes that the vacancy must actually arise or occur during the recess.¹⁰

The most natural reading of the text supports Professor Rappaport. “Happen” and “occur” are synonyms; the term “happen” seems to refer to an *event* rather than a *condition* or *state*. Yet, almost no one reads, or has ever read, the clause this way. Indeed, the matter lacks major controversy, and my prediction is that Professor Rappaport’s article will fail to generate any. Why does the clause so clearly mean something it does not say? It can only be because the “arise” interpretation does not make sense in light of the clause’s purpose. If the president needs to make an appointment, and the Senate is not around, *when* the vacancy

president’s nominees).

⁶ See, e.g., 1 Op. Att’y Gen. 631, 632 (1823) (describing the “meaning” of the Recess Appointments Clause as being to permit the president to fill a vacancy, “which the public interest requires immediately to be filled” when “the advice and consent of the Senate cannot be immediately asked, because of their recess”; “The substantial purpose of the constitution was to keep these offices filled; and the powers adequate to this purpose were intended to be conveyed.”).

⁷ See generally CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

⁸ U.S. CONST. art. II, § 2.

⁹ See Hartnett, *supra* note 1, at 105-131; Rappaport, *supra* note 2, at 14 (“While the [arise] interpretation was employed by the first Attorney General in 1792, the [exist] interpretation was adopted by Attorney General Wirt in 1823 and has been followed by the government ever since.”). The *en banc* Court of Appeals for the Eleventh Circuit recently agreed, though over the dissent of one judge who took the position that the vacancy must arise during the recess. See *Evans v. Stephens*, 387 F.3d 1220, 1226-27 (11th Cir. 2004) (*en banc*); *id.* at 1229-31 (Barkett, J., dissenting).

¹⁰ Rappaport, *supra* note 2, at 13-44.

arose hardly matters; the point is that it must be filled now. This represents a straightforward instance of purpose trumping, or at least informing our reading of, the text.¹¹

An implicit understanding of purpose comes into play in one other way in this argument. Attorney General Henry Stanbury once argued if “happen” meant “occurring during the recess,” then the president could possess authority to make a recess appointment when the Senate is *in* session. This would happen if a position opened during the Senate’s recess, triggering the recess appointment authority, but was still not filled when Senate returned; an appointment made then would still fill a vacancy that “happen[ed] during the recess of the Senate.” Therefore, “happen during the recess” must mean “exist” rather than “occur.”¹² The force of this argument arises from the fact any interpretation that allows the president to make a recess appointment when there is no recess must be wrong, because it is so flatly at odds with the clause’s *purpose*.

Both Hartnett and Rappaport consider Stanbury mistaken, but *not* because they would accept an interpretation under which the president could make a recess appointment while the Senate was in session. They each accept that any such reading must be wrong.¹³ Rather, for different reasons, each concludes that the text does not pose the problem Stanbury identifies. For Hartnett, *neither* the exist nor the arise reading produces this problem; for Rappaport *both equally* produce the problem, which he cures by implying a term.¹⁴ Thus, Stanbury, Hartnett, and

¹¹ Professor Rappaport makes a strong argument for why his reading of the original meaning of the clause is supported not only by text but by considerations of structure and purpose as well. *Id.* at 17-27. For my purposes, it does not matter whether he is correct. It suffices that: (1) he is obliged to make such an argument to contradict the more common purpose-based arguments; and (2) other interpreters have consistently relied on purpose.

¹² See 12 Op. Att’y Gen. 32, 38-39 (1866).

¹³ Hartnett, *supra* note 1, at 381 n.20; Rappaport, *supra* note 2, at 38-39.

¹⁴ Hartnett solves the problem by relying on the phrase “during the Recess of the Senate” to modify, awkwardly, both its immediate antecedent (“that may happen”) and the phrase before that (“The President shall have Power to fill up all Vacancies”). Hartnett, *supra* note 1, at 381 n. 20. On this reading, the actual text requires that the president act during the recess. Rappaport’s approach is different. He concludes that under either reading, a triggering vacancy is still a triggering vacancy even after the Senate returns; it was either a vacancy that arose during the recess or a vacancy that existed during the recess, as the case may be. Thus, *both* interpretations require something to be read in to avoid Stanbury’s absurd result. He cures the problem by implying the phrase “during the recess” after the word “Commissions.” Rappaport, *supra* note 2, at 39. For both Hartnett and Rappaport, then, the absurdity of a recess appointment made when the Senate is not in recess must be avoided; Stanbury was just wrong in thinking that this was a reason to choose between the “arise” interpretation and the “exist” interpretation. Notably, each is willing to manhandle the text pretty significantly to ensure the right result, Hartnett by making the “during the Vacancy” phrase do ungrammatical double-duty, and Rappaport by implying terms that are not there.

Somewhat hesitantly, I would suggest that Stanbury may actually have been correct. Under the arise interpretation, “happen” refers to a specific event. A vacancy that “happened”

Rappaport are all driven to find a way to ensure that the text make sense in light of its purpose. Each takes a different route to ensure this congruence, but each is determined to do so. That determination illustrates the importance of reading (or even supplementing) a text in light of its purpose; the variations illustrate one of the limitations of doing so.

In short, the interplay of text and purpose here seems to be as follows. The text suggests one outcome, but does not necessarily compel it. The textual uncertainty is increased by the fact that the most natural reading seems to produce an absurd result in one particular setting. Because of the textual uncertainty, considerations of purpose become critical and are sufficient to trump the text.

B. *What Counts as a Recess?*

The situation is somewhat different with regard to the question of what counts as a recess, although considerations of purpose are critical here as well. Two issues arise: first, whether an intrasession break counts as a recess, and second, if it does, whether some intrasession breaks are too short to qualify. The text here is again uncertain; “recess” is not a precise term of art. The difficulty is that considerations of purpose do not clearly resolve the interpretive questions either.

Considerations of purpose are the basis of the intuition that an intrasession break is not a “recess.” Intrasession breaks are generally shorter than intersession breaks, and the problems to which the Recess Appointments Clause responds do not arise when the Senate will be back in a minute; the appointment can wait. On the other hand, those who argue that the clause does extend to intrasession recesses rest *that* conclusion on an argument from purpose. For example, when, in 1921, Attorney General Daugherty rejected a predecessor’s opinion¹⁵ and concluded that the recess appointment power does extend to intrasession appointments, his essential justification was that intrasession breaks can be long enough to raise a genuine concern regarding keeping the machinery of government running.¹⁶ Moreover, intrasession recesses

(i.e. arose) “during the Recess” remains such even after the Senate returns. That is Stanbury’s point. But under the “exist” interpretation, “happen” refers to a condition, a state of affairs, and that state of affairs no longer exists once the Senate has returned. A vacancy that existed or was occurring “during the Recess” is over once the recess is over.

¹⁵ See 23 Op. Att’y Gen. 599 (1901) (opinion of Attorney General Knox concluding that “recess” refers only to the break between sessions of Congress); see also Brief for the United States in Opposition, at 28, *Miller v. United States*, 2004 WL 2112791 (No. 04-38) (“Inter-session and intra-session recesses equally implicate the concerns and purpose of the Clause.”).

¹⁶ See 33 Op. Att’y Gen. 20, 25 (1921) (arguing that an intrasession recess can have the same

can be longer than intersession recesses; thus there will be instances in which allowing recess appointments during the latter and not during the former seems flatly inconsistent with purpose.¹⁷ Finally, the universal unwillingness to deem a break of just a few days to be a constitutional “recess” stems from the fact that the underlying purpose of the clause is not at all served by allowing a recess appointment in such circumstances. Indeed, little other than considerations of purpose might identify a line between intrasession breaks that count as recesses and those that do not.

With regard to the first issue (when must a vacancy arise?), the text was somewhat unclear and considerations of purpose seem to point strongly toward a particular interpretation, thus purpose carried the day. With regard to the second issue (what’s a recess?), neither the text *nor* the purpose point indisputably to a particular outcome. That is, the vagueness of the text compels resort to purpose, but considerations of purpose can be plausibly invoked to support conflicting interpretations.

C. *Can the President Make a Recess Appointment of a Judge?*

Consideration of underlying purpose tends to disappear in discussions of the third issue, whether recess appointments of Article III judges are permissible at all. To my knowledge, no one has argued that recess appointments of judges are necessary to ensure the smooth functioning of the federal judiciary. In this setting, the entire emphasis is on text and past practice, which seem to sweep all before them.

The textual support for judicial recess appointments is strong indeed. Following the Appointments Clause’s list of presidential appointees, which includes “judges of the supreme court and all other officers,” the Recess Appointments Clause gives the president power to fill “*all* vacancies.” That is awfully clear.¹⁸ The clarity is matched by a

practical effect as an intersession recess, but that a break of five to ten days would not trigger the clause). Attorney General Daugherty observed that the purpose of the clause was to ensure that the President could “keep . . . offices filled” and avoid any “interval of time where there may be an incapacity of action.” This purpose would be defeated if intrasession recess appointment were per se impermissible. *Id.* at 22-23.

¹⁷ See, e.g., Brief for the United States in Opposition, at 29, *Miller v. United States*, 2004 WL 2112791 (No. 04-38) (“A recess-appointment power that could be freely invoked during a one-day inter-session recess, but would be categorically barred during a three-month intra-session recess, would . . . ill serve the purpose of the Clause.”).

¹⁸ Two efforts to create some textual uncertainty can be made. First, a later overruled panel of the Ninth Circuit wrote that the Recess Appointments Clause “does not mention the judiciary at all,” and thus was too weak a reed to overcome the structural arguments against judicial recess appointments. *United States v. Woodley*, 726 F.2d 1328, 1331 (9th Cir. 1983), *rev’d*, 751 F.2d 1008 (9th Cir. 1985) (en banc). While it is true that the Recess Appointments Clause does not

consistent practice; presidents going back to George Washington have made over 300 recess appointments to Article III courts.¹⁹ It is hard to find anyone—other than losing litigants or bitter senators²⁰—who argues that recess appointments of Article III judges are unconstitutional *per se*.²¹

Yet, this conclusion cannot be defended on the basis of the purpose of the Recess Appointments Clause. There is simply no *need* for a recess appointment power as to judges. The federal judiciary consists of hundreds of judges; judges from other courts frequently sit by designation; courts take frequent recesses themselves; with the exception of constitutional speedy trial guarantees and the occasional statutory requirement of expedited review, federal judges do not operate under time limits and litigation typically lasts for years. To say that a particular court will function *better* with every seat filled hardly establishes that the appointment cannot wait until the Senate returns from its recess.

As Professor Hartnett stresses in his opening section, not all offices are created equal. He points to the “great lengths” that the Constitution goes to in order to ensure that the executive branch remains functioning at all times.²² In contrast, the Framers expected the judiciary and the legislature to operate with breaks; the expectation was, and the practice has been, that they will come and go, meeting only for part of the year

mention the judiciary, it does not mention the executive branch either; the silence therefore does not create any textual ambiguity.

A second textual argument looks beyond the Appointments Clause to Article III. A time-limited recess appointment is at odds with life tenure. If Article III actually said that judges have life tenure, then there would be a real *textual* conflict and uncertainty. But all Article III actually says is that judges “shall *hold their offices* during good behavior.” U.S. CONST. art. III, § 1 (emphasis added). There is no *textual* inconsistency in saying that a recess-appointed judge must be allowed to hold his office, one which expires at the end of the next Senate session, as long as he meets the standards of good behavior. Principles of judicial independence embodied in Article III provide a strong *structural* argument against judicial recess appointments, as I discuss below; but the *text* of Article III is not inconsistent with that of the Recess Appointments Clause.

¹⁹ Hogue, *supra* note 3, at 659. There have been only four such appointments, including the appointments of Pickering and Pryor, in the last forty years. *Id.*

²⁰ See Brief of Amicus Curiae Senator Edward M. Kennedy in Support of Petitioner at 14-20, *Miller v. United States* (No. 03-48) (supporting the petition for a writ of certiorari) (arguing that recess appointments of Article III judges are unconstitutional, at least if made during an intrasession recess).

²¹ See *generally* *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc) (holding that the recess appointments power extends to Article III judges); *accord* *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962); Hartnett, *supra* note 1, at 151-153; Lawrence Solum, *Going Nuclear: The Constitutionality Of Recess Appointments to Article III Courts*, Legal Theory Blog (April 30, 2003), at http://lsolum.blogspot.com/2003_04_01_lsolum_archive.html. Professor Rappaport does not address this question, but seems implicitly to accept the constitutionality of judicial recess appointments.

²² Hartnett, *supra* note 1, at 102.

in terms, or sessions. Accordingly, a little down time creates far fewer problems for the judiciary than for the executive. Indeed, it is to be assumed. Professor Hartnett's discussion concerns the nature of a congressional "session" and a congressional "recess." But, his account also highlights a large difference between judicial appointments and executive appointments.

Moreover, powerful structural reasons prompt caution with regard to recess appointments. A recess appointee serves a limited term, lacking life tenure,²³ and in most cases will be hoping for Senate confirmation before that term ends. These circumstances put the recess appointee in something of the same position as a law professor on a "look-see visit"; his or her job becomes one extended interview. These circumstances are utterly at odds with the commitment to judicial independence reflected in Article III's good behavior clause and salary protections.²⁴

In short, the question whether the Recess Appointments Clause applies to Article III judges raises a stark conflict between, on the one hand, structure and purpose and, on the other hand, clear text and settled practice (which, given how longstanding that practice is, also tells us something about the original understanding). As is generally the case in such settings, text wins.²⁵

II. VARYING PURPOSES, CONSTANT TEXT

The foregoing raises three additional questions of general relevance to constitutional interpretation. The broadest concerns the interplay of text and purpose, which falls outside the scope of this comment. But two questions remain: first, whether considerations of purpose may lead to different interpretations of the same text in different settings; and, second, whether it is proper to stick to an old text and justify the *constant* understanding by *changing* purposes.

²³ Cf. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982) (emphasizing values of an independent judiciary and the constitutional structures designed to ensure that independence).

²⁴ See generally *United States v. Woodley*, 751 F.2d 1008, 1022-24 (9th Cir. 1985) (en banc) (Norris, J., dissenting).

²⁵ See generally Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1245 (1987) (arguing for a hierarchy of sources of constitutional interpretation in which text is at the top, followed, in order, by intent, "constitutional theory" (which, in Fallon's taxonomy, includes arguments based on purpose and structure), precedent, and moral and policy values).

A. *How Many Appointments Clauses?*

The Constitution seems to contain only one Appointments Clause. The same text, and so the same procedures, apply to the appointment of *all* federal officers, including the wide range of executive branch officials as well as federal judges. Yet, officials and judges come in all shapes and sizes. The Appointments Clause makes only one minor provision for this variation, allowing Congress to eliminate advice and consent for “inferior officers.”²⁶ Other than that, it establishes one mechanism for a variety of different appointments.

Procedures must be tailored to the setting. The Supreme Court’s balancing test in *Mathews v. Eldridge*²⁷ articulates a general truth: appropriate procedures are a function of what goals one seeks to achieve. In other words, procedures will vary with circumstances. If the offices to which appointments are made vary, then the constitutionally established appointments process will be suboptimal in many of its applications.

Small wonder, then, that while on paper only one Appointments Clause exists, in practice there are at least three. Consider the requirement of senatorial advice and consent: The Senate plays a very different role for Supreme Court appointments than for executive branch appointments, where it is far more deferential.²⁸ The blocked judicial nominees for George W. Bush’s first term would all have been confirmed to executive branch positions, as their non-judicial counterparts were. Miguel Estrada could have been Attorney General; John Ashcroft could not have been a judge on the D.C. Circuit. While the Senate occasionally disapproves an executive nominee, and, more often, a nominee facing a bruising confirmation battle withdraws or is abandoned by the president,²⁹ overall, the Senate approval rate is far higher for these nominees. When the Senate rejected the nomination of John Tower, the first President Bush’s nominee for Secretary of Defense, in 1989, he was the first cabinet nominee in thirty years to be

²⁶ U.S. CONST. art. II, § 2 (“Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

²⁷ 424 U.S. 319 (1976).

²⁸ See, e.g., ROBERT E. LITAN & WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION 62-64 (1983) (noting that despite the Senate’s ostensible role in confirming nominees, “the appointment of regulatory officials in practice has clearly been an executive branch prerogative”).

²⁹ The names of Bernard Kerik, Launi Guanier, and Zoe Baird come to mind. See Eric Lipton & William K. Rashbaum, *Kerik Withdraws as Bush’s Nominee for Security Post*, N.Y. TIMES, Dec. 11, 2004, at A1; Michael Kelly, *Settling In: The President’s Day; Clinton Cancels Baird Nomination for Justice Dept.*, N.Y. TIMES, Jan. 22, 1993, at A1; Neil A. Lewis, *Clinton Abandons His Nominee for Rights Post Amid Opposition*, N.Y. TIMES, June 4, 1993, at A1.

voted down. There has not been another since.³⁰ Indeed, only eight cabinet nominees have *ever* been rejected by the Senate.³¹ Moreover, the striking difference in confirmation rates of judicial and non-judicial nominees *understates* the difference in the level of deference. Presidents nominate against the background of this general understanding; thus, some potential judicial nominees are scratched off the list as unconfirmable without ever being nominated, whereas the president can be relatively bold in choosing executive branch officials.³²

Not only is there a difference between judicial and executive appointments, there exist profound differences within the former. The Senate's role in Supreme Court appointments, though, of course, varying, has always been more consent than advice. With District Court judgeships, on the other hand, it is the White House that historically has consented, as the *de facto* appointment power lies with the home state senator(s) of the president's party.³³

This variation raises the question whether the constitutional *standard* varies with the office or only the *practice* under that standard. The question is perhaps nonsensical, since disentangling "law" from practice, mutual understanding, accommodation, and politics is probably impossible here. I do not think it unreasonable, however, to suggest that the Senate's power does indeed vary as a matter of constitutional law. Considerations of structure suggest both a greater need for senatorial involvement and review with regard to judges than executive officials and a stronger argument for presidential autonomy in the selection of the latter than the former. Without entering into the debate about the unitary executive, the constitutionality of independent agencies, and the general nature of presidential authority, I would at least say that the president possesses significant power to direct executive officials, which he lacks with regard to judges, as well as a legitimate need to be able to count on their loyalty and like-mindedness. Accordingly, muscular advice and consent with regard to executive officials would interfere with the president's constitutional authority—would be "unconstitutional"—when the same level of scrutiny of judicial appointees would not.³⁴

³⁰ Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687, 1690 & n.12 (2001).

³¹ *Id.*

³² See generally William G. Ross, *The Senate's Constitutional Role in Confirming Cabinet Nominees and Other Executive Officers*, 48 SYR. L. REV. 1123 (1998) (arguing for a more robust Senate role).

³³ See Donald R. Songer et al., *Presidential Success Through Appointments to the United States District Courts*, 24 JUST. SYS. J. 283, 284-85 (2003).

³⁴ The analysis is more complicated than this, for what matters is not merely the *strictness* of the Senate's review, but also the permissible grounds for rejection. Suppose we agree that it *is* constitutionally legitimate for the Senate to consider (either strictly or deferentially) a judicial

So, the upshot seems to be this: a single, vague text applies in quite different settings. The interpretation of this text is, necessarily, informed by considerations of structure and purpose. As a result, the same words mean something different in the different settings.³⁵

Suppose we take a similar approach to the answers to all three of our basic questions: When must the vacancy arise? What is a recess? Which offices may be filled with recess appointments? If purpose is weighted heavily, the answers could vary according to the office in question. Most obviously, the president would have a freer hand with regard to recess appointments of executive branch officials than with regard to judges, both because the need for dispatch is greater and because the case for presidential autonomy is stronger. Hartnett suggests some self-restraint along these lines, but he sees it as coming from political forces and mutual understandings, not constitutional law.³⁶ I would put it more strongly. The Recess Appointments Clause, as a deviation from standard procedures, should be read no more expansively than its purpose requires. That makes it legitimate, despite the constant text, to conclude that intrasession appointments are permissible for executive branch appointees but not for judges, or even that recess appointments of judges are impermissible altogether.

B. *An Aside on the Filibuster*

The interplay of text and purpose with regard to recess appointments makes the constitutional question quite different from, for example, the question of the constitutionality of filibustering judicial nominees. Here too the structural considerations vary with the setting. Therefore the filibuster of a nomination does not necessarily pose the same constitutional issues as the filibuster of proposed legislation.³⁷ An

nominee's integrity, competence, and ideology. (The last is of course a matter of debate, see generally Lawrence Solum, *Judicial Selection: Ideology versus Character*, 26 CARDOZO L. REV. 659 (2004).) It would still be constitutionally quite dubious for the Senate to reject an executive branch nominee because it disagreed with the nominee's ideology. To the contrary, the general understanding is that the president, having won the election, must be left free to choose appointees precisely because their ideological commitments align with his, and the Senate is obligated to accept that.

³⁵ For an example of just this approach to understanding the Senate's constitutional powers and obligations under the advice-and-consent provision, see David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1501-02 (1992).

³⁶ See Hartnett, *supra* note 1, at 162-165.

³⁷ In their contribution to the present volume, Professors Chemerinsky and Fisk pause only briefly before concluding that there is no distinction between filibustering judges and filibustering other matters. See Erwin Chemerinsky & Catherine Fisk, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331 (2004). For the reasons that follow, it seems to me the

appointments filibuster shifts power to the Senate, or at least a part of the Senate, taking it away from the president. Simply put, it makes it harder for the president to get his nominees approved. A legislative filibuster, however, makes it harder for the proponents of legislation (which may include the president but necessarily and essentially includes *other members of Congress*) to get their bills enacted. It does not raise the same issues of the dilution of presidential authority. Even where the president is the proponent of legislation, there is less reason to be concerned about creating barriers to his legislative agenda than there is to be concerned about creating barriers to his appointments, since in the one setting his role is secondary and in the other it is primary.

The reason there is clearly room for such considerations is that the Constitution does not include a “Filibuster Clause,” defining the scope of the “filibuster power” and, depending on its terms, perhaps precluding the possibility that the constitutionality of filibusters would vary with the circumstances. Absent a directly applicable text, arguments of purpose and structure mark the beginning and end of the inquiry.

C. *Changing Purposes*

Modern transportation and the change in the frequency with which the Senate meets render the Recess Appointments Clause an anachronism. As with the requirement that no congressional district have fewer than 30,000 people,³⁸ changed circumstances make it obsolete. The Senate is simply never out of session long enough for a vacancy, in particular a judicial vacancy, truly to need filling before its return. Certainly, no one could suggest with a straight face that the recent recess appointments of judges were in any way related to the clause’s underlying purposes. In each case, the Senate returned within a week or less, and the nominations had been stalled for months.³⁹ If any

possibility of such a distinction is more serious than they perceive it to be, although they may be right that the distinction cannot ultimately be made, or enforced.

³⁸ U.S. CONST. art. I, § 2.

³⁹ Judge Pryor was appointed on Friday, February 20, 2004, during a ten-day, intrasession recess. The Senate was returning the following Tuesday. Hogue, *supra* note 3, at 656. The vacancy had arisen in December 2000; Pryor was nominated for a permanent position in April 2003. Rappaport, *supra* note 2, at 4 n.9.

Judge Pickering was appointed on Friday, January 16, 2004, during the intersession recess. See Neil A. Lewis, *Bush Seats Judge After Long Fight, Bypassing Senate*, N.Y. TIMES, Jan. 17, 2004, at A1. The Senate went into session the following Tuesday, January 20. Pickering had

urgency existed, it was created not by the Senate's *absence* but by its imminent *return*; a physical inability to act on the nominations was hardly the problem.

I am told that Sigmund Freud advised his patients never to get married while they were in analysis. The decision was sufficiently momentous, and the analysand's state of mind in sufficient upheaval, that it made sense to wait. Such a prohibition looks like a pretty significant restraint, since psychoanalysis can go on just about forever. Apparently modern analysts have backed away from Freud's rule. The standard explanation for this deviation is that when Freud was practicing "analyses were short, and marriages were long." Similarly, in the context of recess appointments, in the early days of the Republic vacancies were short, and recesses were long. But now we have a more or less permanent Congress while the process of filling judicial vacancies takes months or years. During the first two years of the Carter administration, judicial vacancies remained open for an average of thirty-eight days; during the last two Clinton years, that number was 226 days.⁴⁰ It is simply impossible to justify modern uses of the Recess Appointments Clause in terms of its original purpose.

That does not mean, however, that recess appointments lack an important function. For example, the recess appointment power has been critical to the appointment of minorities to the bench.⁴¹ When the politics are right, a recess appointment may help the ultimate confirmation of a controversial nominee. Recently, President Bush has found it a tool for circumventing and/or publicizing what he deems the uncooperativeness, if not the unconstitutional obstructionism, of Senate Democrats. It has also been suggested that recess appointments can

first been nominated on May 5, 2001, more than two and a half years before his recess appointment. *Judiciary Committee Report on Nominees, 108th Congress*, Dec. 10, 2004, at 17, available at http://judiciary.senate.gov/noms/108/committee_report.pdf.

Judge Gregory was appointed on December 27, 2000, after the 106th Congress adjourned *sine die*; the new Senate began its session on January 3, 2001. Gregory had been nominated on June 30, 2000. Louis Fisher, *Recess Appointments of Federal Judges*, CRS Report RL31112 (Sept. 5, 2001), at 22, available at <http://www.senate.gov/reference/resources/pdf/RL31112.pdf>.

⁴⁰ Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 679 (2003).

⁴¹ The most famous instance is President Kennedy's recess appointment of Thurgood Marshall to the Second Circuit. See generally Richard L. Revesz, *Thurgood Marshall's Struggle*, 68 N.Y.U. L. REV. 237 (1993) (describing the tortured course of Marshall's nomination and recess appointment and the subsequent delay, repeated hearings, threatened filibuster, and eventual, 11th-hour confirmation by the Senate). But it is also not a coincidence that Roger Gregory, the first African-American appointee to the Fourth Circuit, was a recess appointment, as were four of the first five African-American appointees to the Federal Courts of Appeals—in addition to Marshall, they were William Hastie, A. Leon Higginbotham, and Spottswood Robinson. See *President Clinton Appoints Roger Gregory to the United States Court of Appeals for the Fourth Circuit* (White House Press Briefing, Dec. 27, 2000), available at http://clinton4.nara.gov/WH/new/html/Fri_Dec_29_135529_2000.html.

lead to a healthy national dialogue about appointments criteria.⁴²

These justifications are all what in administrative law are dismissed as “ex post rationalizations,” which by their very ex post-ness are insufficient bases for upholding agency action.⁴³ Should such justifications inform the understanding of the scope of the recess appointments power? Put differently, can or do we have a dead Constitution with living purposes?⁴⁴

I want to distinguish three different sorts of arguments from purpose and structure. Two are utterly familiar. First, one might argue that because of changing circumstances, the reading of the Constitution must change so that it can continue to fulfill its *original* purposes. So, for example, David Strauss and Cass Sunstein argue that the Senate’s advice and consent authority should be read as more robust at present than in the past, because a variety of circumstances have shifted excessive authority from Congress to the president.⁴⁵ In order for the overall system to function as intended, the Senate must go beyond its traditional (at least traditional for the last century or so) relatively restrained role. This is a standard “living Constitution” sort of argument. Applied to the recess appointments power, this approach argues for “interpreting” the recess appointment power narrowly, since it is wholly unjustifiable by its original purposes.⁴⁶

⁴² See Randolph J. May, *Checkmate in the Judges Game? For Democracy’s Sake, President Bush Should Threaten a Recess Appointment, or Two*, LEGAL TIMES, Sept. 8, 2003, at 58 (recommending the use of recess appointments and suggesting that “the heat generated by recess appointments would create the opportunity—indeed, necessity—for the president to lead an edifying dialogue”).

⁴³ See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49-50 (1983).

⁴⁴ The goal of a “dead Constitution” is a familiar trope of Justice Scalia’s. See, e.g., Sally K. Hilander, *Justice Scalia Debunks the “Living Constitution” Theory*, 24 MONT. LAWYER 1, 33 (1998) (quoting Scalia as saying in a speech that while “[m]ost Americans now believe the Constitution is a living document,” he was “here to try to sell you the *dead* Constitution”). For a standard statement of his rejection of the “living Constitution” approach, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 41-47 (1997).

⁴⁵ See Strauss & Sunstein, *supra* note 35. The nature of their argument is illustrated by the following passage:

[S]ince 1969, circumstances have changed. Current conditions—conditions that are unique in our history—justify a more active role for the Senate. These circumstances include a large number of consecutive appointments by Presidents of one party during a period of divided government; the danger of intellectual homogeneity on the current Court; overt ideological attacks by the President on the Court and the self-conscious screening of nominees to the Court by the executive branch; the effective exclusion of the Senate from the selection of lower federal court judges; and the increased importance of separation of powers questions. Under these conditions, deference by the Senate is likely to produce neither a Court of high quality nor a Court with the appropriate range of views.

Id. at 1502-03 (footnote omitted).

⁴⁶ Professor Hartnett convincingly shows that recess appointments of judges *were* necessary to ensure the smooth functioning of the judiciary at the time of the founding. See Hartnett, *supra*

Alternatively, one could focus on circumstances *at the framing* in trying to read the text in light of its contemporary purpose, the sort of archeological inquiry that Professor Rappaport conducts. He takes questions of purpose and structure very seriously, not because they will produce a sound construction of the Constitution for the present day, but because they help reveal the original understanding. Under this approach, the fact that the Recess Appointments Clause is no longer justifiable for the original reasons is neither here nor there. Those reasons were coherent at the time, and the resulting provision stands unless and until the Constitution is amended.

A third way argument from purpose would be to invoke *new* purposes—values the clause now serves that were inapplicable two centuries ago. Suppose we conclude that the original justifications once supported extending the recess appointment power to judges and to intrasession appointments. They no longer do. But we have *new* reasons for giving the president such authority. Do they count?

Such purposes undeniably do count with regard to the continued *existence* of an ancient provision. Legislatures keep in place old laws that have long outlived their original justifications but serve new and different purposes. We do the same with regard to the Constitution. The Electoral College is an example. The framers' goals (for example, preventing a popular vote⁴⁷ and ensuring the dominance of slave states⁴⁸) no longer justify this mechanism for presidential selection. To the extent the Electoral College survives for reasons other than inertia, however, it is because its current supporters articulate other justifications.⁴⁹

My inquiry is slightly different, however. It is whether newly discovered purposes should not only justify the continued existence of the Electoral College, or the Recess Appointments Clause, but whether they should inform *interpretation* of the relevant constitutional provisions. The answer must be yes, but with reduced weight. The inquiry changes from one about “purpose” to one about “policy.” If purposive interpretation differs from mere consideration of policy,⁵⁰ it is because of the lawmaking authority of the original enactors. Once we

note 1, at 154. My point is only that circumstances have utterly changed since, which is why the argument here is in its nature identical to that made by Strauss and Sunstein.

⁴⁷ See, e.g., Thomas E. Cronin, *Foreword*, in JUDITH A. BEST, *THE CHOICE OF THE PEOPLE?: DEBATING THE ELECTORAL COLLEGE* ix (1996) (noting the delegates' particular opposition “to direct election by the people because many delegates thought it unlikely or impractical for the average citizen to know enough about candidates from other states, and doubtless, too, most delegates questioned the ability of the people to cast responsible votes”).

⁴⁸ See *id.* at ix-x; Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 *CARDOZO L. REV.* 1145, 1154-56 (2002).

⁴⁹ See generally BEST, *supra* note 47.

⁵⁰ See Fallon, *supra* note 25.

exchange *their* purposes for ours, we are invoking policy alone.

The Recess Appointments Clause thus lands us in a peculiar position. Inquiries into purpose are a standard and important tool in interpreting the clause. Yet the sort of argument Strauss and Sunstein make—that a particular interpretation will further the framers’ purposes—is unavailable. The clause has become irrelevant to the framers’ purposes. One can take the milder position that a certain interpretation reflects sound policy. And one can argue, as both Hartnett and Rappaport do, that a particular reading *would have* served the framers’ purposes a century or two ago. But the only reading that is *now* consistent with the framers’ purposes, at least with regard to judges and arguably with regard to all appointees, is to read the clause out of the Constitution. That option seems foreclosed by the text.

III. FORMALISM AND FUNCTIONALISM IN SEPARATION OF POWERS

For two decades, the methodological debate in matters of separation of powers such as this has been between formalists and functionalists.⁵¹ That distinction usually arises when evaluating the constitutionality of an innovation—the legislative veto,⁵² the independent counsel,⁵³ the Gramm-Rudman-Hollings Act.⁵⁴ The question is whether changed circumstances justify some deviation from the Constitution’s formal and literal requirements. Functionalists endorse flexibility, often on the ground that modified governmental structures serve underlying constitutional goals as well as, if not better than, strict adherence to literal constitutional prescriptions.⁵⁵

The question I have raised here is different. It is not about the constitutional legitimacy of an innovation; rather it concerns whether the *old* ways of doing things can still be justified given changed

⁵¹ See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1530 (1991) (describing “the scholarly debate about separated powers” as “polarized, for the most part, between the formalists and the functionalists—a battle between those who would pay the price of rigidity in order to achieve an elusive determinacy on the one hand, and those who would pay the price of indeterminacy in order to achieve unguided flexibility on the other”); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) (first using the terms “formalism” and “functionalism” in this context).

⁵² See *INS v. Chadha*, 462 U.S. 919 (1983) (striking down one-house legislative veto provision).

⁵³ See *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding independent counsel law).

⁵⁴ See *Bowsher v. Synar*, 478 U.S. 714 (1986) (setting aside balanced budget law).

⁵⁵ See, e.g., *Chadha*, 462 U.S. at 974 (White, J., dissenting) (arguing that changed circumstances had rendered the legislative veto “necessary if Congress is to fulfill its designated role under Art. I as the Nation’s lawmaker”).

circumstances. Bill Eskridge has observed that “[f]ormalist reasoning promises stability and continuity of analysis over time; functionalist reasoning promises adaptability and evolution.”⁵⁶ Might the functionalist commitment to adaptability and evolution result in the elimination of the recess appointment power given its obsolescence? The answer is clearly no. That time has kicked the foundations out from under a power-granting provision so that it no longer serves its original functions may permit a narrowing construction. It does not allow a court to announce the provision ineffective or void.⁵⁷ In this setting, everyone is a formalist.

And yet no one is. It is a familiar point that a formalist objection to particular governmental arrangements or assertions of authority invites a formalist response. For example, after the Supreme Court struck down the legislative veto, in *INS v. Chadha*,⁵⁸ because the i’s and t’s of Article I, § 7 had not been dotted and crossed, then-Judge Breyer wrote an article explaining how Congress could set up an arrangement that was in every practical respect identical to the legislative veto but satisfied the Court’s formalist objections.⁵⁹

Similarly, one could imagine lawyerly and formalist initiatives with regard to recess appointments. Suppose Professor Rappaport is correct, and for purposes of the clause a “recess” is the period between sessions of Congress. The Constitution does not require that each Congress hold two and only two “sessions.” I would think that pursuant to the authority of each House to make rules for its own proceedings⁶⁰ Congress could decide to hold twelve “sessions” each calendar year, with a few days off—perhaps just a weekend—between them.⁶¹ Under this setup, *all* recesses would be “intersession” recesses, and appointments such as Judge Pryor’s would be permissible even under

⁵⁶ William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Case*, 22 HARV. J. L. & PUB. POL’Y 21, 21 (1998).

⁵⁷ The consensus on this point is seen, for example, in the almost uniformly negative reaction to Judge Calabresi’s analogous argument that judges should assert the authority to invalidate obsolescent statutes. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

⁵⁸ 462 U.S. 919 (1983).

⁵⁹ Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 793-95 (1984). Breyer’s proposal, which, in his words, “is not a precise functional replica of the veto, but it comes close,” *id.* at 795, was for a fast track mechanism for automatic congressional confirmation of agency regulations through “legislation,” which would require action, akin to the veto, to derail this process of default approval.

A similar proposal surfaced with regard to the line item veto. If Congress maintained its existing procedures, but then had an employee disaggregate its spending bills so that each section had its own bill number, the president would have what is functionally the line item veto, because each line item would be a separate “bill,” that he could sign or veto.

⁶⁰ U.S. CONST. art. I, § 5 (“Each House may determine the Rules of its Proceedings . . .”).

⁶¹ Professor Hartnett concludes that Congress would have to make such a change “by law,” meaning the President would have to agree. See Hartnett, *supra* note 1, at 146-147.

Professor Rappaport's view. While such a change increases the opportunities for recess appointments, it would in fact decrease rather than enhance presidential authority. The appointee's commission must "expire at the End of their next Session," which would be, by definition, the following month. This device would in effect eliminate the recess appointment power.

Why then does Congress not take such action? In principle, Congress should be wary about recess appointments, which by their nature reduce the Senate's power and increase the president's. One would think that it would take what measures it could to undercut the president's power here and so increase its own. Several answers suggest themselves. First, such a change might require the president's signature,⁶² which would be unlikely. Second, as of this writing, "Congress"—defined as a majority of senators—does *not* want to reduce the president's recess appointment power. They want to see more nominations go ahead and, like President Bush, view recess appointments as one response to the frustrations of Democratic filibusters.

But the third, and I think most important, reason is that these things *never* happen. In contrast to the innovative mechanisms that, say, tax lawyers create in order to adhere to the limitations of form while evading a rule's underlying functional justifications, Congress does not try to legislate its way around formal limitations. Thus, proposals for a fast-track confirmatory procedure, or for disaggregating spending measures into hundreds of separate "bills," never went anywhere. Neither would the twelve-sessions-a-year idea. There are surely many reasons why they do not. But the beginning of an answer would seem to lie in the facts that: (1) Congress and the president both realize that two can play this game; (2) political will always matters as much as legal authority; and (3) the participants are all repeat players, who do not know whether their side is going to control the White House, Congress, both, or neither at any given point and so cannot risk shifting too much authority to any particular locus.

CONCLUSION

The Recess Appointments Clause should be read in light of its purpose. Both Professor Hartnett and Professor Rappaport do so, though the first relies on purpose to understand the clause's modern meaning and the second to understand its original meaning. Because

⁶² See *supra* note 61.

recess appointments, or at least recess appointments of judges, simply do not serve the original purposes underlying the clause, the task of purposive interpretation is more complex than it first seems. I have tried to unpack some of the opportunities and limitations of arguments from purpose and structure in this setting.