

RECESS APPOINTMENTS TO THE FEDERAL JUDICIARY: AN UNCONSTITUTIONAL TRANSFORMATION OF SENATE ADVICE AND CONSENT

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INTRODUCTION

The importance of judicial independence from executive and legislative control is a deeply held tenet of American democracy. The Declaration of Independence, the Constitution, and some of the most important early writings on the American constitutional system stress the importance of an independent judiciary. Chief Justice John Marshall espoused:

The Judicial Department comes home in its effects to every man's fire-side: it passes on his property, his reputation, his life, his all. . . . will you allow a Judge to give a decision when his office may depend upon it? when his decision may offend a powerful and influential man? . . . If they may be removed at pleasure, will any lawyer of distinction come upon your bench? No, sir. I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary.¹

The question of the influence upon the judiciary that the executive or legislative branches may gain through recess appointments has reemerged as a public concern following the recess appointments of Judge Pickering to the Fifth Circuit Court of Appeals and Judge Pryor to the Eleventh Circuit Court of Appeals. Not since the Eisenhower recess appointments of the 1950s has so much attention been focused on the constitutionality and practical consequences of these appointments.

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¹ Jefferson B. Fordham & Theodore H. Husted, Jr., *John Marshall and the Rule of Law*, 104 U. PA. L. REV. 57, 61 (1955) (quoting PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30, at 615-19 (1830)).

This essay contributes to the understanding of recess appointments in three areas. First, Part I of this article contains a thorough historical analysis of Attorney General Opinions discussing the constitutionality and proper use of judicial appointments. In Part II, these executive branch opinions are complemented by an exploration of congressional responses. Part III of this article contains an evaluation of judicial statements and practice, as well as an extensive analysis of the conflict between Article III's judicial protections and the Recess Appointments Clause. Finally, Part IV of this article presents a new lens through which to view recess appointments. From both a legal and political science perspective, recess appointments can be seen as transforming the Senate from an ex-ante evaluator of a nominee's potential to an ex-post assessor of a judge's performance. Part IV also explores the political implications and impact upon the separation of powers caused by this shift.

Article II of the Constitution announces the method by which judges will ascend to office. The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States."²

Article III of the Constitution guarantees that "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."³

These two provisions guide the appointment and service of judges in the federal courts. After being appointed with the "advice and consent" of the Senate, judicial independence and security is assured by what is often described as Article III's guarantee of life tenure and guaranteed compensation.⁴ Another provision of the Constitution, however, calls into question not only the appointment process, but also the necessity of Article III protections for a sitting Federal District Court Judge, Circuit Court Judge, or Supreme Court Justice.

The Constitution describes a process for what have become known as "recess appointments." Article II, Section 2, Clause 3 of the Constitution states 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 Ses-

² U.S. CONST. art. II, § 2, cl. 2.

³ U.S. CONST. art. III, § 1.

⁴ See, e.g., Discussion, *A Discussion of Judicial Independence with Judges of the United States Court of Appeals for the Tenth Circuit*, 74 DENV. U. L. REV. 355, 366 (1997) [hereinafter *Discussion of Judicial Independence*] (statement of Judge Bobby R. Baldock) ("[T]he life tenure and guaranteed compensation provisions permit us to exercise that power independently.").

sion.”⁵ The proper application and understanding of the Recess Appointments Clause has troubled constitutional scholars, judges, and litigants for generations.

The Supreme Court has never directly addressed the inherent constitutional conflict created by the recess appointment of federal judges. Can a judge appointed under Article II, Section 2, Clause 3, without the advice and consent of the Senate, and with a term of office scheduled to expire at the end of the next session of Congress be considered an “Article III Judge?”⁶ Article III mandates that judges have lifetime tenure and guaranteed compensation. The tenure of a recess appointee is explicitly limited to the end of the next session of Congress. It is unclear how a recess appointee can “exercise the judicial power of the United States without violating [A]rticle III.”⁷

Additional questions arise from judicial recess appointments. These questions concern the proper role of the Senate in judicial appointments, the public and private right to have a case heard by a judge who possesses lifetime tenure, the potential effects upon sitting judges who also have nominations pending before the Senate, and the implications of senatorial review of judicial appointments moving from ex-ante review to ex-post review. Each of these concerns must be considered in the legal, political, and academic debate surrounding the propriety of recess appointments to the federal judiciary.

I. HISTORICAL CONTEXT

A. *General Historical Precedent*

The question of who should have the power to appoint federal judges initially divided the Framers. Some delegates favored extensive appointments to ensure accountability. Other delegates argued for legislative control of appointments, fearing that the possibilities for abuses, such as nepotism, were too high if one person held such an important power.⁸ The compromise reached was intended to guarantee roles for both the President and Senate, balancing ac-

⁵ U.S. CONST. art. II, § 2, cl. 3.

⁶ The Supreme Court has failed to grant certiorari in the lower court cases that have discussed this issue. See, e.g., *Evans v. Stephens*, 125 S. Ct. 1640 (2005) (denying certiorari of case questioning constitutionality of Judge Pryor’s recess appointment to the Eleventh Circuit).

⁷ Paul Ferris Solomon, Comment, *Answering the Unmasked Question: Can Recess Appointees Constitutionally Exercise the Judicial Power of the United States*, 54 U. CIN. L. REV. 631, 633 (1985).

⁸ See Laura T. Gorjanc, Comment, *The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent*, 54 CASE W. RES. L. REV. 1435, 1450 (2004) (“[I]f one person possesses that power alone, the threat of abuse is extremely high.”).

countability with a check upon power: the President has the absolute power to nominate, but appointment requires Senate consent.⁹

The result of this compromise is the “advice and consent” provision, whose definition has been the subject of much debate in the context of both appointments and treaty-making.¹⁰ From the convention debates to modern academic discussion, it is clear that there is a constitutionally mandated role for the Senate in judicial nominations. The size and character of that role, however, has never been clearly delineated.¹¹

Recess appointments allow the President to make appointments without Senate input. To understand the Recess Appointments Clause, it is important to understand the context in which it was written. In the eighteenth century, it was common for the Senate to recess for six to nine months every year.¹² The Framers feared that the checks and balances placed upon appointments would handicap the executive branch if the President were unable to “fill vacancies that occurred during the long intersession recesses when the Senate, with its members dispersed throughout the country, could not readily reconvene to provide its advice and consent.”¹³

Historical evidence indicates that the Recess Appointments Clause was intended as a supplementary procedure, adopted without any intent to supplant the Senate’s constitutional role.¹⁴ Alexander Hamilton wrote that “The relation in which [the Recess Appointments] [C]ause stands to the other . . . 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.”¹⁵

⁹ See Power of President to Fill Vacancies, 3 Op. Att’y Gen. 673, 675 (1841) [hereinafter Power of President to Fill Vacancies (1841)] (discussing the balance of power between the Senate and the President with regard to judicial appointments).

¹⁰ See, e.g., Howard R. Sklamberg, *The Meaning of “Advice and Consent”: The Senate’s Constitutional Role in Treaty-making*, 18 MICH. J. INT’L L. 445, 447–50 (1997) (discussing the origins of the “advice and consent” clause); Scott R. Ryther, Note, *Advice and Consent: The Senate’s Political Role in the Supreme Court Appointment Process*, 1988 UTAH L. REV. 411, 411 (examining “[t]he implications of the ‘advice and consent’ language . . . in light of the origin and history of the constitutional provision”).

¹¹ See, e.g., Charles Babington, *Frist Urges End to Nominee Filibusters*, WASH. POST, Apr. 25, 2005, at A1 (discussing the propriety of filibusters during Senate confirmation proceedings).

¹² Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, at 10 (Univ. of San Diego Sch. of Law, Legal Studies Research Paper Series No. 05–26, October 2004), available at <http://ssrn.com/abstract=621381> (“When the Constitution was written, intersession recesses regularly lasted between six and nine months.”).

¹³ Michael A. Carrier, Note, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2224–25 (1994).

¹⁴ *Id.* at 2225.

¹⁵ THE FEDERALIST NO. 67, at 409 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

One concern of the eighteenth century was that without the Recess Appointments Clause, the Senate would be obliged to remain continually in session.¹⁶ Recalling a senator to the capital in the eighteenth century might have taken weeks, during which important positions, such as Secretary of State, Attorney General, and ambassadorships, might go vacant. Beginning in 1789, and for the ten following sessions of Congress, the average length of intersession recesses was seven months.¹⁷ Today, Senate recesses are normally four to five weeks.¹⁸

The Recess Appointments Clause was a practical necessity of its time, passed without any intent of altering the newly established nomination and appointment framework. "Modern transportation and the change in the frequency with which the Senate meets render the Recess Appointments Clause an anachronism. . . . It is simply impossible to justify modern uses of the Recess Appointments Clause in terms of its original purpose."¹⁹

Established procedures to fill temporary judicial vacancies make the need for recess appointments even less pressing. When a post is vacated, other Article III judges, with the protections of lifetime tenure and guaranteed compensation, can fill the vacancy through "inter- and intra-circuit transfers."²⁰ These transfers along with the custom of retired, "senior" judges hearing cases, allow federal judges possessing the absolute protections of Article III to hear cases when judicial vacancies arise, thereby eliminating much of the stress upon the system.

A major claim by proponents of recess appointments is that historical practice justifies their continued use.²¹ There have been more than 300 recess appointments to the federal judiciary since 1789.²² One of the few judicial opinions to examine recess appointments spoke of "an unbroken acceptance of the President's use of the recess

¹⁶ See *id.*

¹⁷ William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515, 515–16 (2004). Each term of Congress, which lasts two years, has one intersession recess between the customary two sessions of the Congress.

¹⁸ *Id.* at 516.

¹⁹ Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443, 454–55 (2005).

²⁰ Mayton, *supra* note 18, at 516.

²¹ See generally Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758 (1984) (examining the history of recess appointments and their role in the modern trend of judicial appointments).

²² Stuart Buck, et al., *Judicial Recess Appointments: A Survey of the Arguments*, FEDERALIST SOC'Y 2 (2004), <http://www.fed-soc.org/pdf/recapp.pdf>.

power to appoint federal judges by the three branches of government.”²³

Despite the claims of recess appointment advocates, however, the total number of appointments does not provide a comprehensive understanding of their use or answer questions regarding their validity. During the Nixon, Ford, Carter, Reagan, George H. W. Bush, and Clinton administrations, only two recess appointments were made to the federal bench.²⁴ Most of the 300 recess appointments were concentrated from 1897–1963. During this sixty-six year period, 200, or two-thirds of all recess appointments, were made.²⁵ This historical survey illustrates that throughout most of U.S. history, including the founding period, recess appointments to the federal bench were a rare and disfavored occurrence.

To understand fully the historical practice of recess appointments to the federal bench, scrutiny beyond a cursory numerical examination is necessary. It is important to understand not just whether appointments occurred, but how the appointees responded. The two most recent recess appointees, Judge Pryor and Judge Pickering, both appointed by President George W. Bush, heard and decided many cases while their nominations were pending before the Senate.²⁶

Their decision to hear cases and make decisions prior to Senate confirmation breaks with historical tradition. The majority of recess appointees did not hear any cases until a Senate confirmation ensured lifetime tenure and guaranteed compensation. In one study of recess appointments to the lower courts, only thirty-one percent of 294 appointees heard cases prior to confirmation.²⁷

A thorough examination of the historical record casts further doubt upon the Ninth Circuit’s assertion of “unbroken acceptance,” in *United States v. Woodley*.²⁸ The executive branch has repeatedly expressed doubt over the extent of the recess appointment power.²⁹ The Supreme Court, while never having directly questioned the valid-

²³ *United States v. Woodley*, 751 F.2d 1008, 1011 (9th Cir. 1985) (en banc) (describing presidential use, failure of the Supreme Court to object, and Congressional recognition in the form of legislation providing for the salaries of recess appointees). *But see infra* note 93 and accompanying text; *infra* Part III.

²⁴ Buck, et al., *supra* note 22, at 16.

²⁵ *Id.*

²⁶ *See, e.g.*, *Jamerson v. Sec’y for the Dep’t of Corr.*, 410 F.3d 682 (11th Cir. May 27, 2005) (Pryor, J.); *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346 (5th Cir. Nov. 2, 2004) (Pickering, J.); *United States v. Chavarria*, 377 F.3d 475 (5th Cir. July 12, 2004) (Pickering, J.); *Bost v. Federal Express Corp.*, 372 F.3d 1233 (11th Cir. June 8, 2004) (Pryor, J.). Judge Pickering’s nomination is no longer pending; he has retired from the federal bench. Judge Pryor began serving as a recess appointee beginning on February 20, 2004; the Senate confirmed him on June 9, 2005.

²⁷ Mayton, *supra* note 17, at 540.

²⁸ *Woodley*, 751 F.2d at 1011.

²⁹ *See infra* Part II.A.

ity of recess appointments, has never explicitly approved of the process either.³⁰ Many cases challenging the issue of a judge's standing to hear a case may not have been brought because of an 1899 Supreme Court decision prohibiting collateral attack on the jurisdiction of a judge holding authority under the color of law.³¹ The assertion that Congress has accepted the appointment of judges without the advice and consent of the Senate is also mistaken. The Senate has repeatedly voiced its opposition to the recess appointment of temporary judges.³²

B. History of Intrasession Recess Appointments

In addition to the general misgivings expressed by scholars and government actors toward recess appointments, intrasession recess appointments have been viewed with a particularly skeptical eye. The most recent intrasession recess appointment to the federal judiciary occurred when President Bush appointed William H. Pryor to the Court of Appeals for the Eleventh Circuit on Friday, February 20, 2004, the last business day before the Senate resumed business on Monday, February 23, 2004. The entire intrasession recess during which Mr. Pryor was appointed lasted ten days.³³

Historical practice and precedent do not support an assertion that the President has *carte blanche* to appoint any judge he sees fit at any time when the Congress is not actively meeting. The first intrasession recess appointment to an Article III court occurred in 1867; the next intrasession appointment was eighty years later in 1947. From 1947 to 1954, there were twelve intrasession recess appointments to the federal bench. Almost fifty years passed between the last intrasession recess appointment and that of Judge Pryor. In all, there have been only fourteen intrasession recess appointments to Article III courts. Before Judge Pryor's appointment, only one intrasession Article III recess appointment had occurred outside the period from 1947–1954.³⁴

Judge Pryor's intrasession recess appointment diverged from historical practice in several important ways. Of the thirteen previous intrasession recess appointees to the federal bench, none were made

³⁰ See *supra* note 6 and accompanying text.

³¹ *Ex parte Ward*, 173 U.S. 452 (1899).

³² See *infra* Part II.B.

³³ See Letter from Senator Edward M. Kennedy, to the U.S. Court of Appeals for the Eleventh Circuit 9 (Mar. 5, 2004), available at http://kennedy.senate.gov/~kennedy/11th_Circuit.pdf ("The Senate did not meet for business the day before the holiday weekend and the four business days afterwards.").

³⁴ Memorandum from Henry B. Hogue, Cong. Research Serv., to Senate Democratic Policy Committee (Mar. 2, 2004) (on file with Congressional Research Service).

during a recess of less than one month. The average length of a recess in which an intrasession recess appointment to the federal bench was made is more than seventy-one days.³⁵ In addition, only one previous appointment was to a federal circuit court, every other intrasession recess appointment was to a position in a lower federal court.³⁶

Intrasession recess appointments are rare even outside the context of Article III courts. "Prior to 1943, only Presidents Andrew Johnson, Warren G. Harding, and Calvin Coolidge had made such appointments. Johnson appointed 14 individuals during a single intrasession recess, and Harding and Coolidge each appointed one person in this way."³⁷ Historical reluctance and infrequency should cast a spotlight on intrasession recess appointments to the federal bench. Such appointments should be evaluated to ascertain whether they represent a legitimate exercise of presidential power.

II. EVALUATION OF THE CONSTITUTIONALITY OF RECESS APPOINTMENTS TO ARTICLE III COURTS BY THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT

The Recess Appointments Clause itself allows a great deal of room for interpretation. The text of the 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."³⁸ This clause leaves two significant questions unanswered. First, when does a vacancy "happen during the Recess?" To constitute an eligible vacancy, must the vacancy first appear during the recess or may any existing vacancy be filled during a recess? Second, what constitutes "the Recess?"³⁹ What will distinguish a "recess" from an adjournment? These questions form the specific terms in which the debate over recess appointments traditionally occurs. In reality, however, a larger separation of powers question is being debated: the character and breadth of executive power against the constitutional check of the Senate.

Each of the three branches of government has endeavored to define the terms at issue in the Recess Appointments Clause. They have characterized the clause in ways that protect or expand their own institutional interests while remaining within the constitutional frame-

³⁵ *Id.*

³⁶ *Id.*

³⁷ HENRY B. HOGUE, CONG. RESEARCH SERV., RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS CRS-4 n.7 (Sept. 10, 2002) (on file with Congressional Research Service).

³⁸ U.S. CONST. art. II, § 2, cl. 3.

³⁹ The use of the singular form, "the recess" rather than "recesses" or "adjournments" may relate to the custom of each two-year term of Congress having one extended adjournment, forming two separate "sessions" of each Congress.

work. If the term “may happen” and the definition of “the Recess” are interpreted broadly, executive power will expand at the expense of the Senate; should the terms be defined narrowly, Senate control will expand at the expense of the President.

In their examination of unilateral presidential action, political scientists have observed a historical tendency by Presidents to increase executive power, while Congress and the Courts have been slow to resist presidential expansionism.⁴⁰ These tendencies have led “the recess appointments clause [to evolve] from a limited supplement to be used only when necessary to a method of avoiding the Senate’s express constitutional role in the appointments process.”⁴¹ The ability of the executive branch to expand its power, and the hesitancy of the legislative and judicial branches to push back against this expansion are rooted in structural constitutional forces.

A. *Executive Branch Evaluations of the Power to Make Recess Appointments to Article III Courts*

Successive Attorney General advisory opinions and executive actions have shown an increasingly expansive view of the recess appointment power.⁴² The first official executive branch evaluation of the recess appointment power was written in 1823.⁴³ A vacancy in the position of navy agent at New York expired during the term of the Senate and remained open during an intersession recess. Attorney General William Wirt stated that the President could fill the vacancy if “the public good” or “the safety of the nation, may require it to be forthwith filled.”⁴⁴

[I]f we interpret the word “*happen*” as being merely equivalent to “*happen to exist*,” (as I think we may legitimately do,) then all vacancies which, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the

⁴⁰ See, e.g., Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999) (analyzing the President’s power to construct law on his own).

⁴¹ Stuart J. Chanen, *Constitutional Restrictions on the President’s Power to Make Recess Appointments*, 79 NW. U. L. REV. 191, 196 (1984).

⁴² See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 958 n.183 (2005) (“[T]he Office of Legal Counsel tends to take an expansive view of presidential powers.” (citing Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401, 415–21 (1989))).

⁴³ See Executive Authority to Fill Vacancies, 1 Op. Att’y Gen. 631 (1823) [hereinafter Executive Authority to Fill Vacancies (1823)]. Throughout this Section and in other areas of this paper, the recess appointment power is discussed outside the context of Article III courts. Although there are no Article III implications for non-judicial recess appointments, an understanding of the general operation of the Recess Appointments Clause and its historical use is an important aid in understanding judicial recess appointments.

⁴⁴ *Id.* at 633.

President; and the whole purpose of the constitution is completely accomplished.⁴⁵

The crux of this early interpretation was that while the literal language of the Constitution may prevent such recess appointments, the meaning of the clause was to ensure the continuing functioning of the government. Attorney General Wirt believed his functionalist construction “cannot possibly produce mischief, without imputing to the President a degree of turpitude entirely inconsistent with the character which his office implies”⁴⁶ The “turpitude” mentioned by Attorney General Wirt may refer to the “mischief” a President would cause to the constitutionally mandated confirmation process by using the recess appointment power to evade or override the Senate.

Another early proponent of the expansion of the presidential appointment power was Attorney General Roger Taney, later Chief Justice Taney. He advised President Jackson that “[t]he constitution was formed for practical purposes”⁴⁷ Under his interpretation, the Recess Appointments Clause allowed for presidential appointments in situations where Senate approval was impractical, such as a situation where “an officer . . . die[d] in a distant part of the United States, and his death [was] not . . . known at Washington until after the adjournment”⁴⁸

Breaking with his predecessors, Attorney General Mason rejected the expansive, functionalist view of presidential appointment power in 1845. “If vacancies are known to exist during the session of the Senate, and nominations are not then made, they cannot be filled by executive appointments in the recess of the Senate.”⁴⁹ This narrow, formalist view of the recess appointment power was quickly abandoned and has not been followed.

Twenty years after Attorney General Mason’s opinion, in 1866, Attorney General Stanbery justified presidential appointment power in extremely strong terms. Relying on a practical, functionalist construction of constitutional provisions and a broad reading of the “Take Care” Clause,⁵⁰ he stated, “the President has full and independent power to fill vacancies in the recess of the Senate, without

⁴⁵ *Id.*

⁴⁶ *Id.* at 634.

⁴⁷ Power of President to Fill Vacancies, 2 Op. Att’y Gen. 525, 526–27 (1832) [hereinafter Power of President to Fill Vacancies (1832)].

⁴⁸ *Id.* at 527.

⁴⁹ Appointment of Judges, &c., for Iowa and Florida, 4 Op. Att’y Gen. 361, 363 (1845).

⁵⁰ See U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . .”).

any limitation as to the time when they first occurred.”⁵¹ Stanbery’s advisory opinion also allows for the “daisy-chaining” of recess appointments by the President to completely preclude Senate involvement in the appointment process.⁵² Stanbery relies upon the temporary nature of recess appointments and the goodwill and judgment of the presidency as guards against such abuse of broad appointment powers.⁵³

Given the choice between the restrictive interpretation of executive power presented by Attorney General Mason, and the expansive interpretation offered by Attorney General Wirt, future Attorneys General followed Attorney General Wirt’s advice and relied upon a practical construction of the Recess Appointments Clause.⁵⁴ In so doing, presidential appointment power has been expanded.

In 1862, Attorney General Bates extended the advice given by his predecessors to include Article III courts.⁵⁵ Neither his opinion nor any subsequent Attorney General decisions address the potential conflict between recess appointments and Article III’s guarantees of lifetime tenure and guaranteed compensation.

In 1901, intrasession appointments were formally addressed by the executive branch. In his advisory opinion to the President, Attorney General Knox advocated for a restriction on executive power, stating that the Constitution does not authorize the President to make recess appointments during any adjournment other than the single recess occurring between the two sessions of the Senate.⁵⁶ The opinion found the legal and historical precedents devoid of any case “in which an appointment during a temporary adjournment of the Sen-

⁵¹ President’s Power to Fill Vacancies in Recess of the Senate, 12 Op. Att’y Gen. 32, 42 (1866) [hereinafter President’s Power to Fill Vacancies (1866)].

⁵² Mayton, *supra* note 18, at 544 (citing *id.* at 40).

⁵³ President’s Power to Fill Vacancies (1866), *supra* note 51, at 41 (“[T]he safe and only guard which protects the just rights of the Senate, [is] the express provision that an appointment made in recess shall only extend until the next session of the Senate. . . . It is ample provision to secure the Senate from everything except an abuse by the President . . . of filling vacancies by so exercising them as intentionally to frustrate the intervention of the Senate.”)

⁵⁴ Prior Opinions of the Attorney General support a practical construction of the Recess Appointments Clause. See, e.g., Power of President to Fill Vacancies (1832), *supra* note 47; Power of President to Fill Vacancies (1841), *supra* note 9; Power of President to Appoint to Office During Recess of Senate, 4 Op. Att’y Gen. 523 (1846) [hereinafter Power of President (1846)]; Case of the Collectorship of New Orleans, 12 Op. Att’y Gen. 449 (1868). See generally President—Recess Appointment—Postmaster, 30 Op. Att’y Gen. 314, 315 (1914) (listing eleven previous Opinions of the Attorney General allowing recess appointments to vacancies that were present prior to the end of a Congressional Session).

⁵⁵ See President’s Appointing Power, 10 Op. Att’y Gen. 356, 356 (1862) (informing the President that the recess appointment power “is settled . . . as far, at least, as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine”).

⁵⁶ President—Appointment of Officers—Holiday Recess, 23 Op. Att’y Gen. 599, 604 (1901).

ate was involved.”⁵⁷ If allowed, Attorney General Knox feared that intrasession recess appointments could easily spiral out of control and eliminate Senate confirmation altogether. Knox states, “[i]f a temporary appointment could in this case be legally made during the current adjournment as a recess appointment, I see no reason why such an appointment should not be made during any adjournment, as from Thursday or Friday until the following Monday.”⁵⁸

Although Attorney General Knox wrote the first opinion to address this question directly, the logic of his opinion was consistent with earlier opinions. In the first Attorney General opinion regarding the general question of filling vacancies, Attorney General Wirt stated that the question is “the state of things at the point of time at which the President is called on to act. Is the Senate in session? Then he must make a nomination to that body. Is it in recess? Then the President must fill the vacancy by a temporary commission.”⁵⁹

This hesitancy by the executive branch to increase power over the appointment of officers stood as official policy until 1921 when Attorney General Daugherty penned an oft-cited evaluation of presidential recess appointment power.⁶⁰ This opinion, emphasizing a functionalist, practical construction of the Recess Appointments Clause, stated that the President may make recess appointments during a twenty-eight day adjournment.⁶¹ He relied upon the “broad and underlying purpose of the Constitution,” finding “the real question [to be] . . . whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained. To give the word ‘recess’ a technical and not a practical construction, is to disregard substance for form.”⁶²

Attorney General Daugherty’s remarks are particularly relevant today. While approving of a recess appointment during a twenty-eight day adjournment, he noted that a two, five, or ten-day adjournment would not permit a recess appointment. He concluded, “there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review.”⁶³

Modern executive branch evaluations have supported the policy promoted by the Daugherty opinion, while suggesting that other branches of government have implicitly affirmed the power of the President to make recess appointments regardless of when the va-

⁵⁷ *Id.* at 602.

⁵⁸ *Id.* at 603.

⁵⁹ Executive Authority to Fill Vacancies (1823), *supra* note 43, at 633.

⁶⁰ Executive Power—Recess Appointments, 33 Op. Att’y Gen. 20 (1921).

⁶¹ *Id.* at 25.

⁶² *Id.* at 21–22.

⁶³ *Id.* at 25.

cancy arose.⁶⁴ An extremely aggressive position on the question of recess appointments was adopted by Assistant Attorney General William Barr during the presidency of George H. W. Bush.

Facing a democrat-controlled Senate in the 100th and 101st Congress,⁶⁵ Barr composed a memorandum entitled "Common Legislative Encroachments on Executive Branch Authority."⁶⁶ In this memorandum, Barr characterized attempts to place restrictions on the President's recess appointment power as "dangerous for presidential powers."⁶⁷ In his opinion, he explicitly states the need to preserve the appointment power as a "counterbalance to the power of the Senate. By refusing to confirm appointees, the Senate can cripple the President's ability to enforce the law. The recess appointment power is an important resource for the President, therefore, and must be preserved."⁶⁸ This opinion reshaped the purpose of the Recess Appointments Clause from a means of ensuring continuity in government to a vehicle for asserting presidential control against a hostile Congress.⁶⁹

During the presidency of George H. W. Bush, the Office of Legal Counsel addressed the issue of intrasession recess appointments twice.⁷⁰ While purporting to rely upon the earlier opinion of Attorney General Daugherty to establish historical practice, these opinions greatly expanded executive power by concluding that a recess of eighteen days was sufficient for an intrasession recess appointment,⁷¹ and suggesting that a recess appointment could be made at 11:30 a.m. on the day the Senate was to reconvene at noon from a thirty-eight day recess.⁷² Although these opinions cautioned that, as a matter of policy, recess appointments should be made as early as possible during intrasession recesses, such courtesy was not necessary. The

⁶⁴ See Recess Appointments, 41 Op. Att'y Gen. 463, 468-70 (1960) (discussing the acquiescence to recess appointments by the Congress, federal courts and the Comptroller General); see also Recess Appointments Issues, 6 Op. Off. Legal Counsel 585, 589 (1982) (noting that the validity of earlier Attorney General Opinions remains firm despite recent constitutional developments involving the "pocket veto").

⁶⁵ Democrats held the majority of Senate seats from 1987 to 1995. See Party Division in the Senate, 1789-Present, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Sept. 2, 2005). Barr went on to become Attorney General under President George H. W. Bush, serving from 1991-1993.

⁶⁶ Common Legislative Encroachments on Executive Branch Authority, 13 Op. Off. Legal Counsel 248 (1989).

⁶⁷ *Id.* at 257.

⁶⁸ *Id.*

⁶⁹ See *infra* notes 207-08 and accompanying text.

⁷⁰ Intrasession Recess Appointments, 13 Op. Off. Legal Counsel 271 (1989) [hereinafter Intrasession Recess Appointments (1989)]; Recess Appointments During an Intrasession Recess, 16 Op. Off. Legal Counsel 15 (1992) [hereinafter Recess Appointments (1992)].

⁷¹ Recess Appointments (1992), *supra* note 70, at 15.

⁷² Intrasession Recess Appointments (1989), *supra* note 70, at 273.

authors of these opinions believed the presidential recess appointment power to be absolute.

In response to these arguments, Senator George J. Mitchell rejected the “reversals and inconsistencies” of the “Executive’s historical consideration of the recess appointment power”⁷³ While recognizing the right of a President to make non-judicial intersession recess appointments, Senator Mitchell sharply criticized reliance upon Attorney General advisory opinions and their promotion of intrasession recess appointments.

On the Senate floor, Senator Mitchell sought to introduce an amicus brief to the U.S. District Court for the District of Columbia, which was evaluating the constitutionality of President Bush’s intrasession recess appointment of Thomas Ludlow Ashley as a Governor of the Postal Service.⁷⁴ Although the brief was never submitted to the court, its criticism of the Attorney General opinions is poignant.⁷⁵ After examining the historical progression of these opinions, Senator Mitchell criticized these executive interpretations as demonstrative of

the risk of constitutional interpretation guided more by institutional self-interest than by text and purpose. As the unworkability of its earlier attempts to distinguish between intrasession adjournments of different lengths became apparent in the context of Congress’ contemporary scheduling patterns, the Executive ultimately has come in this case to advance an interpretation of the Recess Appointments Clause that would eviscerate the central decision that the Framers made about the appointment of federal officers: that the appointing power should not be conferred upon the President alone, but should be checked by the Senate.⁷⁶

Despite the complaints by Senate democrats during the previous republican administration, the Clinton administration signaled its approval of intrasession recess appointments in an Office of Legal Counsel memorandum, which stated agreement with the “view that the President has discretion to make a good-faith determination of whether a given recess is adequate to bring the Clause into play.”⁷⁷ The Clinton administration also triggered a renewed debate of the propriety of presidential recess appointments to the federal bench by appointing Roger Gregory to the Court of Appeals for the Fourth Circuit during an intersession recess.⁷⁸

⁷³ 139 CONG. REC. S8544, 8549 (1993) (reproducing a draft of an amicus brief to the U.S. District Court for the District of Columbia).

⁷⁴ 139 CONG. REC. S8544, 8545 (1993).

⁷⁵ *Id.* at 8548–49.

⁷⁶ *Id.* at 8549.

⁷⁷ The Constitutional Separation of Powers Between the President and Congress, 20 *Op. Off. Legal Counsel* 124, 161 (1996).

⁷⁸ *See* Remarks on the Recess Appointment of Roger L. Gregory to the United States Court of Appeals for the Fourth Circuit and an Exchange With Reporters, 3 *PUB. PAPERS* 2783 (Dec.

In statements regarding the recess appointments of Roger Gregory, the Clinton administration justified the use of a recess appointment to the federal bench using logic inconsistent with earlier understandings of the purpose and practical interpretation of the clause.⁷⁹ The administration believed the appointment was necessary due to the Senate's refusal to bring the Gregory nomination to a vote.⁸⁰ Historical justification was derived from the claim that "Presidents have often exercised their recess powers to make historic appointments to bring diversity to the courts."⁸¹ President Clinton greatly expanded presidential power in the area of judicial recess appointments, by justifying his use of a recess appointment in terms of taking action when a hostile Senate would not, rather than the traditional justification of the Senate not being in session or available to confirm a nominee. He also laid the groundwork for the use of recess appointments by the Bush administration.

Current President George W. Bush made his first recess appointment to an Article III court on January 16, 2004, during an intersession recess.⁸² In statements concerning the appointment of Judge Charles W. Pickering to the United States Court of Appeals for the Fifth Circuit, the President followed the Clinton administration model. President Bush did not mention the availability or unavailability of the Senate; instead, the appointment was justified as a response to "obstructionist tactics" by democratic senators.⁸³ This same justification was used a month later during an intrasession recess when William Pryor was appointed to the United States Court of Appeals for the Eleventh Circuit.⁸⁴

27, 2000) (announcing Gregory's appointment in light of Senate refusal to confirm President Clinton's earlier nominees).

⁷⁹ *Id.* It is important to remember that it was this practical interpretation that allowed recess appointment in cases where the vacancy did not arise for the first time during the recess. The position that Judge Gregory now occupies had been vacant for almost ten years before his appointment.

⁸⁰ *See id.* ("Time and again, for 5 years now, I have tried and tried to fill these gaps in justice and equality [by nominating Roger Gregory]. And time and again, for 5 years now, the Senate majority has stood in the way.")

⁸¹ THE WHITE HOUSE OFFICE OF COMM'NS, FACT SHEET ON APPOINTING GREGORY TO THE U.S. COURT OF APPEALS (Dec. 27, 2000), 2000 WL 1883392. Judge Gregory is the first African-American to sit on the Fourth Circuit Court of Appeals. *Id.* Thurgood Marshall was a recess appointment to the Second Circuit, and "[f]our of the five first African American appellate judges were recess appointed to their first Article III position." *Id.*

⁸² *See* Statement on the Recess Appointment of Charles W. Pickering To Serve on the United States Court of Appeals for the Fifth Circuit, 40 WEEKLY COMP. PRES. DOC. 91 (Jan. 16, 2004) (announcing Pickering's appointment).

⁸³ *Id.*

⁸⁴ *See* Statement on the Appointment of William H. Pryor, Jr., To Serve on the United States Court of Appeals for the Eleventh Circuit, 40 WEEKLY COMP. PRES. DOC. 259 (Feb. 20, 2004) (announcing Pryor's appointment).

Modern presidential interpretation has turned the early Attorney General opinions on their heads. While continuing to use a practical/functional construction to allow for recess appointments to vacancies that do not technically “happen” during a recess, a literal interpretation of the Senate’s “recess” has replaced practical considerations of Senate availability. President Bush relied upon a literal interpretation of “recess,” ignoring practical Senate availability for advice and consent when making his appointment of Judge Pryor. At the same time he made use of the traditional practical interpretation of “Vacancies that may happen during the Recess” to make an appointment to a vacancy that had existed prior to the recess.⁸⁵ Thus, the Pickering and Pryor appointments combined a practical interpretation of “vacancy” with a literal interpretation of a “recess” that was not considered proper in earlier executive branch analyses of the clause.

This mixing of practical and literal interpretations to achieve the desired executive power exhibits the type of “turpitude” Attorney General Wirt spoke of in 1832. The vacancy to which Judge Pryor was appointed was only eligible for appointment under a practical reading of “may happen.” A consistent practical interpretation would also have evaluated whether the President was unable to secure “advice and consent.” In Pickering’s case, Senate deliberations of the nomination were ongoing, and many senators expressed their intention to oppose confirmation. This was not a situation where the President did not “desire to avoid the controlling action of the Senate,” which was the required standard of an earlier era.⁸⁶

In fulfilling the President’s constitutional duty to “take Care that the Laws be faithfully executed,”⁸⁷ the President should not be permitted to twist the Constitution.⁸⁸ In interpreting the sentence, “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate,”⁸⁹ President Bush used a practical construction of “may happen” to grant himself the general recess appointment power over the Eleventh Circuit vacancy, and a literal construction of the term “recess” to allow him to make the appointment during the short intrasession recess. While scholars and administration officials may disagree as to whether a practical/functionalist or

⁸⁵ U.S. CONST. art. II, § 2, cl. 3.

⁸⁶ Power of President (1846), *supra* note 54, at 528 (approving of a recess appointment of a postmaster and giving the clause practical construction).

⁸⁷ U.S. CONST. art. II, § 3. The “Take Care” Clause is mentioned by many Attorney General Opinions as the reason for the practical construction of the Recess Appointments Clause.

⁸⁸ This criticism applies to both the Clinton and Bush administrations. I have focused upon the Bush administration because its actions are more recent and this administration has been more explicit regarding its intent.

⁸⁹ U.S. CONST. art. II, § 2, cl. 3.

textual/formalist interpretation is proper, inconsistent interpretations used to achieve desired ends should be prohibited. The manipulation of the recess appointment power to avoid the Senate's constitutional role and achieve the appointment of desired candidates is inconsistent with the spirit of "advice and consent."

B. Congressional Response to Recess Appointments

Since recess appointments are an executive action, the history of legislative responses to recess appointments is less exhaustive than the executive branch's history of recess appointment discussion and evaluation. Congress has very little control over presidential recess appointments. The legislature can voice disapproval and work with the President, but there is no law that Congress is capable of passing to trump a constitutional provision. While restricted in its actions, Congress has exercised control over recess appointments using the power most readily available to them: the power of the purse. This ability to control, through the appropriation or withholding of funds, has been recognized as "the most important single curb in the Constitution on Presidential power."⁹⁰

Despite the claims of Attorneys General that recess appointments have been sanctioned by "unbroken acquiescence of the Senate," tracing the legislative response to recess appointments reveals consistent dissatisfaction by the legislature and many attempts to derail the practice.⁹¹ The use of *Youngstown* standards in evaluating executive power are complicated by constitutional provisions both for and against the power to make judicial recess appointments.⁹² While it is unclear whether Congress has acted in a way that specifically restricts presidential power, it has certainly not granted statutory powers to the President regarding recess appointments.

⁹⁰ EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 101 (13th ed. 1973) (quoted in GELLHORN AND BYSE'S *ADMINISTRATIVE LAW* 234 (Peter L. Strauss et al. eds., Rev. 10th ed. 2003)).

⁹¹ Chanen, *supra* note 41, at 200 (quoting President's Appointing Power, *supra* note 55, at 356).

⁹² This discussion uses the framework of presidential power presented by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). Presidential action in this area could be considered either part of the twilight of presidential power, in which Congress has not spoken, or part of the nadir of presidential power, in which the President is reliant upon Article II powers to trump congressional action. The *Youngstown* analysis presented in some discussions is of questionable use given that the recess appointment conflict involves an explicit Article II provision that would establish absolute presidential power against an explicit Article III provision, which would limit presidential power regardless of congressional acquiescence. See Curtis, *supra* note 21, at 1781–82 (arguing that congressional acquiescence in or approval of a President's use of executive power should allow courts to legitimately infer that such use of power is part of the structure of our government).

The “unbroken acquiescence of the Senate” repeatedly cited by Attorney General and judicial opinions was actually broken for the first of many times in 1813.⁹³ The Senate protested President Madison’s appointment of commissioners to negotiate peace with Great Britain. This protest took the form of a resolution as well as a Senate Committee Report declaring that the President may only make recess appointments to “offices that became vacant during the Senate Recess.”⁹⁴ The report’s findings were based on the Constitution as well as past exceptions to the general rule “in which the Senate had granted the President special authority to fill vacancies in offices that Congress had created at the very end of its session.”⁹⁵ If the Senate believed that the President already possessed the power to make these appointments, no special provisions would have been necessary.

In 1863, Congress attempted to limit the use of the recess appointment power by prohibiting payment to recess appointees who were appointed to vacancies that existed prior to a recess.⁹⁶ As part of an appropriations package, it was enacted that:

[N]o money shall . . . be paid out of the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, which vacancy existed while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate.⁹⁷

The intent of the legislature in 1863 was very clear. As Senator Fessenden opined, by prohibiting the payment of recess appointees to positions in which the Senate had an opportunity to provide advice and consent but had chosen to remain silent, Congress “will probably put an end to the habit of making such appointments.”⁹⁸

By prohibiting payment to recess appointees Congress implicitly admits the existence of such appointments. This acknowledgment, however, is not equivalent to a recognition of constitutionality. Acceptance of constitutionality cannot be extrapolated from a congres-

⁹³ Chanen, *supra* note 41, at 200.

⁹⁴ *Id.* at 201 (citing T. SERGEANT, CONSTITUTIONAL LAW 373 (2d ed. 1830)) (summarizing the Senate Committee Report of April 25, 1822).

⁹⁵ *Id.*

⁹⁶ STAFF OF H. COMM. ON THE JUDICIARY, 86TH CONG., RECESS APPOINTMENTS OF FEDERAL JUDGES 25 (Comm. Print 1959) (reprinting the 1863 bill and quoting from Senator Trumbull, CONG. GLOBE, 37th Cong., 3d Sess. 565 (1863)).

⁹⁷ Act of Feb. 9, 1863, ch. 25, 12 Stat. 646 (1863), *amended by* Act of July 11, 1940, R.S. § 1761, 54 Stat. 751 (codified as amended at 5 U.S.C. § 56 (2000)). Beginning in 1940 and in subsequent versions of the law, some exceptions to the general prohibition were allowed. The current law is codified at 5 U.S.C. § 5503 (2000).

⁹⁸ STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 96, at 26 (quoting Senator Fessenden, CONG. GLOBE, 37th Cong., 3d Sess. 565 (1863)).

sional decision to operate within the constraints of current constitutional interpretation.⁹⁹

Congressional attempts to control general presidential appointment power have also implicated the recess appointment power and given Congress, and the Senate in particular, a greater opportunity to advance its interpretation of the Recess Appointments Clause.¹⁰⁰ By defining “recess” and limiting payments to recess appointed officers, Congress has been able to limit the President’s ability to fill vacancies outside of a Senate-defined recess.¹⁰¹

Congress has also repeatedly endorsed the importance of lifetime tenure for judges of the lower federal courts. By echoing the constitutional protections of lifetime tenure in a statute, providing that judges “shall hold office during good behavior,” Congress implicitly recognizes the importance of lifetime tenure, and provides a statutory bar in addition to the existing constitutional bar against temporary judges.¹⁰²

The definition of the term “recess” figures prominently in the debate about when a presidential recess appointment may occur. In a 1905 report by the Committee on the Judiciary, the Senate sought to define what constitutes a recess, and to enunciate the powers and limitations of the President during a Senate recess.¹⁰³ The Senate report was prepared in response to a letter from the Secretary of War, Elihu Root. In this letter, the Secretary advanced a claim of a “constructive recess,” during which the President could fill vacancies for military officers.¹⁰⁴ Senator Tillman submitted a report to the Senate from the Judiciary Committee, sharply criticizing the concept of a “constructive recess,” and clarifying that the Senate is in recess when it is in no position to exercise advice and consent. The report stated:

⁹⁹ *But see* Recess Appointments, 41 Op. Att’y Gen. 463, 466 (1960) (“5 U.S.C. 56, which originally prohibited the payment of appropriated funds as salary to a person who received a recess appointment if the vacancy existed while the Senate was in session implicitly assumed that the power existed, but sought to render it ineffective by prohibiting the payment of the salary to the person so appointed”).

¹⁰⁰ *See, e.g.,* Tenure of Office Act of 1867, ch. 154, 14 Stat. 430 (1867)(defining the President’s power to make recess appointments), *repealed by* 24 Stat. 500 (1887).

¹⁰¹ *See* 5 U.S.C. § 3349 (1982) (using the phrase “a vacancy occurring during a recess of the Senate,” rather than the constitutional phrase “may happen during the Recess of the Senate,” to restrict the recess appointment power), *repealed by* Pub. L. No. 105–277, § 151, 112 Stat. 2681 (1998).

¹⁰² 28 U.S.C. § 44(b) (2000) (“Circuit judges shall hold office during good behavior.”); 28 U.S.C. § 134(a) (2000) (“The district judges shall hold office during good behavior.”).

¹⁰³ S. COMM. ON THE JUDICIARY, REPORT ON “RECESS OF THE SENATE,” ETC., S. REP. NO. 4389 (1905).

¹⁰⁴ ELIHU ROOT, LETTER FROM SECRETARY OF WAR SUBMITTING THE VIEWS OF THE DEPARTMENT IN REGARD TO WHAT IS CALLED A “CONSTRUCTIVE RECESS,” S. DOC. NO. 58–147, at 1 (1904).

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

[In the situation at hand,] [t]here was no “recess” within the letter or spirit of the Constitution, and therefore there was no right to issue commissions and induct the officers commissioned into office.¹⁰⁵

By asserting its right to define the “recess,” the Senate was able to limit the President’s power to appoint officers who had not received advice and consent.

The Senate’s focus in 1905 was to prevent recess appointments except in cases where the Senate’s advice and consent could not be received. Even when the advice and consent of the Senate could not be received, “the report expressly acknowledges the Senate’s recognition of the Framers’ focus on recesses *during which it would be harmful if an office were not filled*. . . . [F]or the Framers those recesses were the longer intersession recesses, not the brief intrasession breaks.”¹⁰⁶

Although the 1905 Senate Report intended only to counter any attempted appointments during “constructive recesses,” its logic is still applicable and may be extended to the modern debate. The Senate of 1905 introduced a practical construction, which would only allow recess appointments when the Senate is unavailable to receive nominations and the nation would be harmed if the office were not filled. Today, “[b]ecause . . . [the] Senate receives presidential nominations during recesses and can pursue advice-and-consent procedures during these recesses, the recess envisioned by the Judiciary Committee in 1905 is vastly different today, highlighting the *diminished need for an expansive reading of the clause in light of current Senate practices*.”¹⁰⁷

In 1959, the House of Representatives Committee on the Judiciary commissioned a report on the recess appointment of federal judges.¹⁰⁸ Although this report did not give a specific opinion as to the constitutionality of recess appointments, it showed that the process had become a “growing concern” for the legislature.¹⁰⁹ The recommendations even went so far as to suggest a constitutional amendment to Article II, Section 2, Clause 3 that would prevent the recess appointment of federal judges.¹¹⁰

The Senate Judiciary Committee also submitted a report regarding recess appointments, in which it recommended the passage of

¹⁰⁵ S. COMM. ON THE JUDICIARY, *supra* note 103, at 3.

¹⁰⁶ Carrier, *supra* note 13, at 2230.

¹⁰⁷ *Id.* at 2230–31 (emphasis added).

¹⁰⁸ STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 96.

¹⁰⁹ *Id.* at III.

¹¹⁰ *Id.* at 38.

Senate Resolution 334.¹¹¹ The resolution expressed “the sense of the Senate,” in opposition to the recess appointments of Supreme Court justices.¹¹² While not speaking directly to the constitutionality of recess appointments to the Supreme Court, the Senate report cited many scholars and news articles, arguing that a recess appointee on the Court would serve under a “mental shadow of this possibility [of Senate rejection, which] could impair the sense of total emancipation from worry over the effects of his decisions in the political community that life tenure for judges was intended to bestow.”¹¹³

The Senate debate regarding Resolution 334 included a record filled with letters from scholars advising against recess appointments to the Supreme Court, and recommending that any recess appointee to the Supreme Court refrain from taking a seat on the bench until after confirmation.¹¹⁴ Senator Joseph C. O’Mahoney warned that the recess appointment of Justices harms the Senate as well as the Justice: “Senators called upon to confirm a sitting Justice are under pressures which they ought not be under; conversely, a Justice sitting without his appointment confirmed is also subject to subtle pressures which should not be permitted to exist.”¹¹⁵

After a great deal of debate, Senate Resolution 334 was passed by a count of forty-eight to thirty-seven in the Senate. The resolution stated that:

the making of recess appointments to the Supreme Court of the United States may not be wholly consistent with the best interests of the Supreme Court, the nominee who may be involved, the litigants before the Court, nor indeed the people of the United States, and that such appointments, therefore, should not be made except under unusual circumstances and for the purpose of preventing or ending a demonstrable breakdown in the administration of the Court’s business.¹¹⁶

While non-binding, the resolution clearly expressed the Senate’s displeasure with President Eisenhower’s use of the recess appointment, and allowed senators to voice their constitutional concerns. Senator Ervin succinctly summarized the concerns of the Senate, articulating his view that “it is somewhat inconsistent with the spirit of the third

¹¹¹ S. REP. NO. 86-1893 (1960).

¹¹² S. Res. 334, 86th Cong., 106 CONG. REC. 10, 12761 (1960) (“[I]t is the sense of the Senate that the making of recess appointments to the Supreme Court . . . should be avoided except under most unusual and urgent circumstances.”)

¹¹³ Arthur Krock, *Judicial Appointments in Absence of Senate*, N.Y. TIMES, May 7, 1959, at A32 (reprinted with S. Res. 334, 86th Cong., 106 CONG. REC. 10, 12761 (1960)).

¹¹⁴ 106 CONG. REC. 14, 18132 (1960).

¹¹⁵ 106 CONG. REC. 14, 18134 (1960).

¹¹⁶ S. Res. 334, 86th Cong., 106 CONG. REC. 14, 18145 (1960).

article . . . for a judge to make decisions when he does not occupy his office for life."¹¹⁷

Since the end of the Eisenhower administration, no President has used the recess appointment power to appoint a Justice to the Supreme Court and the power has been used sparingly with regard to the lower courts. The lack of recess appointments has led to a decrease in congressional discussion of the issue. When Presidents have used the recess appointment power, however, there has been vehement objection by the Senate. Through the introduction of non-binding resolutions and attempts to establish statutory limits on temporary appointments, the Senate has repeatedly voiced its discontent. These resolutions illustrate a "desire for a standard to limit the scope of the clause, but do little to provide constitutional justification for the limits the resolutions propose."¹¹⁸

President Clinton's recess appointment of Roger Gregory to the Fourth Circuit Court of Appeals drew sharp criticism from Senate republicans.¹¹⁹ Most recently, Senate democrats, led by Senator Kennedy, actively fought against the recess appointment of Judge Pryor to the Eleventh Circuit. On March 5, 2004, Senator Kennedy wrote to the Eleventh Circuit expressing doubts regarding the constitutionality of recess appointments to the federal bench and requesting that the court raise the issue *sua sponte*.¹²⁰ When the court chose not to respond *sua sponte*, Senator Kennedy pursued the issue by submitting an amicus brief.¹²¹

As an institution, the Senate has much to lose in the recess appointment debate. If Presidents can make appointments without advice and consent, the constitutional role and power of the Senate will be greatly diminished. Although the Senate has rarely expressed unified displeasure with this executive action, senators outside the President's party have been vocal in decrying the use of the recess appointment power as an infringement upon minority rights and a

¹¹⁷ 106 CONG. REC. 14, 18143 (1960).

¹¹⁸ Carrier, *supra* note 13, at 2232.

¹¹⁹ See, e.g., Audrey Hudson, *Senate Confirms 3 Bush Judges*, WASH. TIMES, July 21, 2001, at A1 (regarding republican senators' negative reaction to the 2000 Gregory recess appointment by Clinton, and Gregory's later support from Bush and approval by the Senate).

¹²⁰ Letter from Senator Edward M. Kennedy, *supra* note 33.

¹²¹ See Brief for United States Senator Edward M. Kennedy as Amicus Curiae, Pro Se, Suggesting Lack of Jurisdiction on the Ground that Judge Pryor's Appointment to This Court is Unconstitutional, Adefemi v. Ashcroft, 335 F.3d 1269 (11th Cir. 2003), *vacated*, 358 F.3d 828 (11th Cir. 2004), *aff'd en banc*, 386 F.3d 1022 (11th Cir. 2004) (No. 00-15783); *United States v. Drury*, 344 F.3d 1089 (11th Cir. 2003), *aff'd*, 396 F.3d 1303 (11th Cir. 2005) (No. 02-12942); *United States v. \$242,484.00*, 318 F.3d 1240 (11th Cir. 2003), *aff'd en banc*, 389 F.3d 1149 (11th Cir. 2004), *aff'd per curiam*, 131 F. App'x 130 (11th Cir. 2005) (No. 01-16485) (en banc order issued by the Eleventh Circuit found motion to file brief, filed June 10, 2004, untimely).

violation of the separation of powers.¹²² This reaction implies that the Recess Appointments Clause itself has been co-opted. Instead of serving to ensure continuity in federal offices, both parties have used it for partisan advancement.

III. EVALUATION BY THE JUDICIARY OF THE CONSTITUTIONALITY OF RECESS APPOINTMENTS TO ARTICLE III COURTS

While the interpretations of the executive and legislative branches of government are important in assessing the validity of recess appointments to the federal bench, the final determination as to constitutionality will most likely be made by federal judges. The judiciary has signaled its opinion on the merits of recess appointments in three forms: out-of-court statements, practice, and legal opinions.

A. *Statements by the Judiciary*

Judicial independence was a principle that the Founding Fathers extolled in the Declaration of Independence. The Founders believed that the King's control harmed the colonial judiciary, making "[j]udges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."¹²³ The importance of judicial independence derived from "judicial tenure of office during good behavior" was espoused by one of our greatest judges, Chief Justice Marshall.¹²⁴

The Code of Conduct for United States Judges prohibits judges from commenting on pending or impending cases.¹²⁵ "The courts will be silent until a case is brought."¹²⁶ These restrictions have stifled much of the judicial response to recess appointments. Nonetheless, statements made by members of the federal judiciary clearly show that lifetime tenure and guaranteed compensation are highly valued protections and are cherished as a means of ensuring independence at all levels of the federal judicial system, from district courts to the Supreme Court.

¹²² See *infra* Part IV.

¹²³ THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

¹²⁴ Fordham & Husted, *supra* note 1, at 60.

¹²⁵ See Code of Conduct for United States Judges, Canon 3, Section A(6), available at <http://www.uscourts.gov/guide/vol2/ch1.html> (providing that a judge should avoid commenting publicly on any pending case or action).

¹²⁶ Mayton, *supra* note 18, at 541 (citing Judge Norris, dissenting in *United States v. Woodley*, 751 F.2d 1008, 1030 (9th Cir. 1985) ("Because the judicial branch is passive, it cannot react to an assertion of power by the political branches until third parties present the courts with a concrete case or controversy. Judicial silence simply cannot be construed as judicial acquiescence.")).

The Founders ardently defended the importance of lifetime tenure as a guarantor of judicial independence.¹²⁷ Many of these eighteenth century arguments are echoed by judges today. Chief Judge Thomas I. Vanaskie of the United States District Court for the Middle District of Pennsylvania, echoes the Founders by arguing that the judicial independence granted by lifetime tenure not only protects the judiciary's role as a check upon the other branches of the federal government, but also preserves the rights and liberties of individuals.¹²⁸ The importance of judicial independence as both a public and private right should lead to special scrutiny when actions infringe upon that independence.

Judges have also recognized the importance of guaranteed compensation in ensuring judicial independence.¹²⁹ Judge Bobby R. Baldock of the United States Court of Appeals for the Tenth Circuit has emphasized the role of guaranteed compensation and lifetime tenure in ensuring the judiciary's independence.¹³⁰ The threat to judicial independence posed by congressional authority over judicial salary is evident in the instructive example of magistrate judges. Magistrate judges, who lack guaranteed compensation, have asserted that their independence is threatened by a lack of Article III protections.¹³¹

Given the importance placed upon an independent judiciary—free from control by the executive or legislative branches—the question arises as to how strongly the judiciary might respond to the recess appointment of judges lacking Article III protections were they not restrained by the canons of the Judicial Code of Conduct.¹³²

B. Practice of Federal Judges Regarding Recess Appointments

The vast majority of recess appointees have declined to issue or sign decisions prior to confirmation. In Professor William Mayton's review of non-Supreme Court recess appointments, he found that roughly sixty-nine percent of recess appointees to the lower courts

¹²⁷ See THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that, in order to remain distinct from the legislature, judges must have permanent tenure).

¹²⁸ Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 VILL. L. REV. 745, 759–60 (2001) (discussing the value of judicial independence).

¹²⁹ See, e.g., *id.* at 753 (noting Alexander Hamilton's belief that guaranteed compensation is key to judicial independence).

¹³⁰ See *Discussion of Judicial Independence*, *supra* note 4, at 356 (quoting Judge Baldock's belief that the judiciary's "independence com[es] largely from the constitutional provisions regarding life tenure and guaranteed compensation").

¹³¹ See *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247, 292–93 (1993) (discussing cases that address the constitutionality of magistrate judges and the right of litigants to an Article III judge).

¹³² See Code of Conduct for United States Judges, *supra* note 125 and accompanying text.

had not heard or decided cases prior to their appointment.¹³³ From 1796 until 1828, no recess appointee heard a case prior to confirmation.¹³⁴ From 1828 until 1891, only six heard cases before confirmation.¹³⁵ The twentieth century saw a steady increase in those judges willing to hear cases prior to confirmation.¹³⁶

The reluctance of judges who received recess appointments to hear cases would be irrelevant to the evaluation of the constitutionality of such appointments, but for the reliance of proponents of recess appointments upon historical practice.¹³⁷ Emphasizing historical acceptance by citing the number of judicial recess appointments fails to appreciate the full measure of judicial reaction.

Justices recess appointed to the Supreme Court have shown a reluctance to hear cases while lacking Article III protections, and with the knowledge that they will be subjected to Senate inquiry. Chief Justice Warren was recess appointed to the Court on October 2, 1953. While *Brown v. Board of Education*¹³⁸ was originally scheduled for reargument on October 12, 1953, the case was rescheduled for argument on December 8, 1953.¹³⁹ The *Brown* decision was not announced until after Chief Justice Warren was confirmed by the Senate on March 1, 1954.¹⁴⁰ "Thus, whatever the southern Senators may have thought Warren's views on desegregation would be, they could not make an issue of them at the confirmation hearings."¹⁴¹

Similar delays followed the recess appointment of Justice Brennan. In the cases of *Jencks v. United States*¹⁴² and *United States v. E.I. du Pont de Nemours & Co.*,¹⁴³ no decisions were announced until after Justice Brennan's confirmation.¹⁴⁴

[T]he motivation for the delay in the *Brown*, *du Pont*, and *Jencks* cases might have been a desire to immunize Chief Justice Warren and Justice

¹³³ Mayton, *supra* note 18, at 540.

¹³⁴ *Id.* at 541.

¹³⁵ *Id.*

¹³⁶ *Id.* This increase may be related to the shifting intent of appointments from filling vacancies expediently to intentionally bypassing Congress. See Common Legislative Encroachments on Executive Branch Authority, *supra* note 66, at 257 (stating that the presidential power to make recess appointments is an important counterbalance to the Senate's power).

¹³⁷ See, e.g., *United States v. Woodley*, 751 F.2d 1008, 1011 (9th Cir. 1985) (relying largely on historical evidence to conclude that judicial recess appointments are constitutional); Curtis, *supra* note 21, at 1773-91 (using historical evidence of recess appointments to support a conclusion favoring the constitutionality of recess appointments).

¹³⁸ 347 U.S. 483 (1954).

¹³⁹ Note, *Recess Appointments to the Supreme Court—Constitutional but Unwise?*, 10 STAN. L. REV. 124, 140 (1957) [hereinafter *Constitutional but Unwise?*].

¹⁴⁰ *Id.* at 141.

¹⁴¹ *Id.* at 140.

¹⁴² 353 U.S. 657 (1957).

¹⁴³ 353 U.S. 586 (1957).

¹⁴⁴ See *Constitutional but Unwise?*, *supra* note 139, at 141.

Brennan from possible strong attacks . . . [S]o long as there is a chance that the Court will be motivated by concern over the repercussions of their opinions in the Senate, the independence of the judiciary is impaired. There is little doubt that the recess appointee himself does not have the requisite independence of article III, and that he must consider the possible effects of his action on the Senate and on the defeated litigants or disgruntled parties who may appear before the Judiciary Committee.¹⁴⁵

An additional factor in judicial reaction to recess appointments is the strain that a recess appointment places on a judge's professional and personal life. One of the benefits of lifetime tenure and guaranteed compensation is that a judge will never have to worry about future clients or moving his or her family because of work requirements. Recess appointees do not enjoy these benefits. Candidates for recess appointments, "especially out-of-towners with families to move, often say they would prefer waiting around for confirmation rather than risk losing the new appointment after little more than a year on the job."¹⁴⁶

C. Legal Opinions Regarding the Constitutionality of Recess Appointments to the Federal Bench

The Supreme Court has clearly stated that when a court is improperly constituted, its decisions cannot stand. This is true even where judges possess Article III protections. Justice Stewart, writing for the majority in *United States v. American-Foreign Steamship Corp.*,¹⁴⁷ found that where a senior judge improperly participated in an en banc court of appeals' proceeding, the judgment must be vacated.¹⁴⁸ Having a properly constituted court, with the protections of Article III, is so important that a unanimous three-judge opinion must be vacated if one of the three judges lacked Article III protections.¹⁴⁹

Most early recess appointments to the federal bench were the subject of little contention. Appointments were made as a matter of convenience, with no intent to circumvent Senate approval. Additionally, since many recess appointees did not hear cases prior to

¹⁴⁵ *Id.* at 142.

¹⁴⁶ LOUIS FISHER, CONG. RESEARCH SERV., RECESS APPOINTMENTS OF FEDERAL JUDGES CRS-12 (Sept. 5, 2001) (on file with Congressional Research Service), available at <http://www.senate.gov/reference/resources/pdf/RL31112.pdf> (quoting Al Kamen, *The Recess Appointment Game*, WASH. POST, Aug. 12, 1996, at A11).

¹⁴⁷ 363 U.S. 685 (1960).

¹⁴⁸ *Id.* at 691.

¹⁴⁹ *See* *Nguyen v. United States*, 539 U.S. 69 (2003) (vacating judgment of a three-judge panel despite the fact that two judges constituted a quorum).

Senate confirmation, there were few litigants who could challenge decisions by recess appointees.¹⁵⁰

In 1899, the Supreme Court, in *Ex parte Ward*,¹⁵¹ prohibited collateral review of judicial decisions by recess appointees.¹⁵² This decision found that a recess appointee is a de facto officer “acting with the color of authority, [so that his decisions,] even if he be not a good officer in point of law, cannot be collaterally attacked.”¹⁵³ Following this ruling, “that the courts lacked jurisdiction to determine whether a trial by a recess appointee violated Article III, no such cases would likely be brought. None were, until the jurisdictional objection was eliminated and the stir generated by the Eisenhower appointees brought the right to the fore.”¹⁵⁴

In the 1962 opinion of *Glidden Co. v. Zdanok*,¹⁵⁵ the Supreme Court erased the bar against collateral challenges it had established in *Ex parte Ward*. *Glidden Co. v. Zdanok* recast the question of whether a judge was in possession of the protections of Article III as a jurisdictional question that could be addressed at any time.¹⁵⁶ This ruling allows litigants to question the jurisdictional authority of judges who lack Article III protections. Under the Court’s new standards, when a case is heard by a judge who lacks Article III protections the ruling is invalid and must be vacated.¹⁵⁷

¹⁵⁰ See Mayton, *supra* note 18, at 520 (“Of the twelve recess-appointments to the Court prior to the Eisenhower appointees, only two had heard cases prior to their confirmation.”).

¹⁵¹ 173 U.S. 452 (1899).

¹⁵² *Id.* at 456.

¹⁵³ *Id.*

¹⁵⁴ Mayton, *supra* note 18, at 541–42.

¹⁵⁵ 370 U.S. 530 (1962).

¹⁵⁶ See *id.* at 584 (holding that a judge of the United States Court of Customs and Patent Appeals could in fact hear a criminal case because such judges possessed the protections of Article III). See also Recent Case, *Constitutional Law—President Has Power to Issue Recess Commission to Federal Judge When Vacancy First Arises During Session of Senate*, 111 U. PA. L. REV. 364, 365 (1963) (stating that *Glidden* “cast considerable doubt on the continuing validity of *Ex parte Ward*” and that the “[*Allocco*] court rejected the applicability of the *de facto* doctrine” to the subject of recess appointments to the federal bench).

¹⁵⁷ See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) (holding that Congress may not delegate Article III powers to a non-Article III court, in this case particularly referring to the bankruptcy courts); see also *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685 (1960) (concluding that when an appeals court panel is improperly constituted, the decision of the panel is void). The Supreme Court most recently addressed the necessity of a properly constituted judiciary as a private right of litigants in *Nguyen v. United States*, 539 U.S. 69 (2003). Justice Stevens delivered the Court’s opinion regarding a criminal appeal in which an “Article IV” judge (lacking Article III protections), appointed to the Northern Mariana Islands sat on a 9th Circuit panel with two judges who possessed the protections of Article III. *Id.* at 71. The presence of a non-Article III judge on a circuit panel was found to violate the statutory requirements of a properly constituted panel, even if the panel decision was unanimous. See *id.* at 76 n.9 (finding it unnecessary to evaluate the constitutional questions regarding Article III protections when a clear statutory violation exists).

Despite these decisions mandating Article III protections, three circuit courts have upheld the constitutionality of recess appointments to the federal bench.¹⁵⁸ While these decisions dominate the discussion of this issue, each was made over strong dissents or academic criticism.

The Supreme Court has not yet signaled approval or disapproval of the findings of the circuit courts. On March 21, 2005, the Supreme Court denied certiorari in *Evans v. Stephens*.¹⁵⁹ Justice Stevens, writing respecting the denial, left the door open for future challenges to the legitimacy of recess appointments to Article III courts:

This is a case that raises significant constitutional questions . . . [T]here are legitimate prudential reasons for denying certiorari in this somewhat unusual case. That being said, it would be a mistake to assume that our disposition of this petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as vacancies on this Court, with appointments made absent consent of the Senate during short intrasession "recesses."¹⁶⁰

Despite the Supreme Court's hesitancy in *Evans v. Stephens* to rule on the legitimacy of the recess appointment of Judge Pryor, Justice Stevens recognized the constitutional question raised, and indicated that if additional recess appointments are made, the Supreme Court may hear challenges to their constitutionality.¹⁶¹

The three circuit court opinions on this subject rely on several false analyses in concluding that recess appointments are constitutional. First, they rely on a mistaken textual analysis. Second, the majority opinions do not recognize the importance of an independent judiciary, misread the legislative history, and misinterpret legislative non-objection as implicit approval. Third, the opinions place far too great an emphasis on historical practice as evidence of de facto constitutionality, relying upon a historical record devoid of abuse as evidence of constitutionality. This reliance on historical evidence also mistakenly reads a guarantee against future abuse from the assertion that, historically, recess appointments have not been abused. Fourth, the early opinions affirming the President's right to make recess appointments to the federal bench have created a cascade effect, which has limited the constitutional analysis, and resulted in opinions that

¹⁵⁸ *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 1640 (2005); *United States v. Woodley*, 726 F.2d 1328 (9th Cir. 1984), *rev'd en banc*, 751 F.2d 1008 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962).

¹⁵⁹ *Evans*, 125 S. Ct. at 1640.

¹⁶⁰ *Evans v. Stephens*, 125 S. Ct. 2244 (2005) (Stevens, J., annotating a prior denial of writ of certiorari).

¹⁶¹ *Id.* ("[I]t would be a mistake to assume that our disposition of this petition constitutes a decision on the merits . . .").

fail to question the underlying values and constitutionality of recess appointments to the federal bench.

1. *Mistakes in Textual Analysis*

The circuit court's textual analysis has strained mightily to fit the recess appointment power, as exercised in the cases before them, into a constitutionally acceptable form. While recognizing the inherent "tension between Article III and the recess appointment of judges to Article III courts," these courts have reached for ways to reconcile the clauses.¹⁶² *Evans* allowed a violation of Article III's requirements in the case of Judge Pryor's appointment on the grounds that "what might be intolerable, if prolonged, was acceptable for a relatively short while."¹⁶³ This analysis may be acceptable if an independent judiciary is seen as a purely public right. However, the guarantee of an independent judiciary also stands as a private right held by litigants.¹⁶⁴

An individual litigant has little concern over a judge's tenure; what is important is impartiality. A litigant has a private right to ensure that the judge in his or her case will not be influenced by congressional or executive criticism. It is a breach of a judge's Article III independence "if his every vote, indeed his every question from the bench, is subject to the possibility of inquiry in later committee hearings and floor debates to determine his fitness to continue in judicial office."¹⁶⁵ A sitting judge should not be forced to work with "one eye over his shoulder on [the] Congress"¹⁶⁶ that must confirm him, and the other eye fixed on a President who can pull his nomination from the floor.

By relying on the acceptance of state court judges who sit without the protections of Article III, the *Evans* court mistakenly extrapolates that "we can readily accept that the Framers would tolerate, on a temporary basis, some federal judges who lack[] Article III protection[s]."¹⁶⁷ This jump is implausible. Would the Framers tolerate temporary elected judges because states elect judges? This defies our federal system.

¹⁶² *Evans*, 387 F.3d at 1223.

¹⁶³ *Id.* at 1224.

¹⁶⁴ See *infra* notes 184–86 and accompanying text.

¹⁶⁵ Henry M. Hart, Jr., *Prof. Hart's Letter*, HARV. L. SCH. REC., Oct. 8, 1953, at 2, quoted in *United States v. Woodley*, 751 F.2d 1008, 1016 (9th Cir. 1985) (Norris, J., dissenting) (discussing Chief Justice Warren's appointment prior to *Brown v. Board of Education*).

¹⁶⁶ Paul Freund, HARV. L. SCH. REC., Oct. 8, 1953, at 1, quoted in *Woodley*, 751 F.2d at 1014 (Norris, J., dissenting).

¹⁶⁷ *Evans*, 387 F.3d at 1224.

Several core questions arise from a textual analysis of the Recess Appointments Clause.¹⁶⁸ First, when does a vacancy “happen during the recess?” Second, what constitutes “the recess?” In textual analysis, it is also important to consider a clause’s function. Is the clause meant as an exception to the general rule or part of the normal constitutional order? If a clause is an exception, its impact should be less expansive.

The Recess Appointment 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.¹⁶⁹

There are two competing interpretations of the Recess Appointments Clause regarding when a vacancy must arise to be eligible for a recess appointment. A broad interpretation would allow appointments during a recess to any existing vacancy; a more narrow interpretation would limit recess appointments to only those vacancies that first arise during the recess. Without a great deal of scrutiny, each of the three circuit courts analyzed the text, finding that the phrase “vacancies that may happen during the recess” implies a presidential right to fill those vacancies that exist during a recess whether they arose during that recess or not.¹⁷⁰ By adopting this broad construction, the courts confer greater authority on the President.¹⁷¹

The alternative interpretation of the Recess Appointments Clause reads the clause as prohibiting recess appointments except where vacancies first arise during that recess. Despite the decisions of the circuit courts, such a reading has strong support from “the more obvious reading of the words, canons of construction about not rendering words to be surplusage, and other constitutional clauses that use the same language.”¹⁷²

The decision in *Evans v. Stephens* to sanction the use of the Recess Appointments Clause during an intrasession recess is contradicted by a textual analysis of the clause. “The use of the plural term *Vacancies*

¹⁶⁸ See U.S. CONST. art. III, § 2, cl. 3 (defining the Recess Appointments Clause); see also *supra* note 39 and accompanying text.

¹⁶⁹ Herz, *supra* note 19, at 453.

¹⁷⁰ See *United States v. Allocco*, 305 F.2d 704, 710 (2d Cir. 1962) (using a practical interpretation of the intent of the clause); *Woodley*, 751 F.2d at 1012 (relying upon historical use and a belief that an alternate interpretation would conflict “with a common sense reading of the word *happen*”); *Evans*, 387 F.3d at 1226 (citing *Allocco* and *Woodley*).

¹⁷¹ See Rappaport, *supra* note 12, at 14 (explaining that under a broad interpretation, the President can “make a recess appointment whenever there is a vacancy during a recess, irrespective of when the vacancy first arose”).

¹⁷² *Id.* at 17.

in the Recess Appointments Clause suggests that the Framers deliberately chose the singular form of the term *Recess*.¹⁷³ This interpretation that the clause refers only to intersession recesses is supported by other clauses in the constitution. The original constitutional provision to fill vacancies in the Senate allowed a governor to make a temporary appointment “during the *Recess* of the [State] Legislature.”¹⁷⁴ In addition, if the Framers intended to include intrasession recesses they could have employed a term used elsewhere in the Constitution: “adjournment.”¹⁷⁵

The lack of debate by the Framers surrounding the Recess Appointments Clause also lends credence to the theory that they did not intend intrasession recess appointments, approved in *Evans v. Stephens*. The constitutional debates illustrate a careful balancing between the power of the President and the Senate with respect to appointments. Recess Appointments fundamentally alter the balance of power between the branches, enabling the President to appoint without consent and gain concessions on permanent nominees. The Recess Appointments Clause was approved with minimal debate because it was not intended to alter the balance of power. The Clause was to operate during the long intersession recesses of the early Congress and not during those times when the Senate was available. “That the Framers intended to give the President such a loophole to escape the normal system of checks and balances in the appointment process seems unlikely in light of the minimal impact the Framers intended the clause to have on the system of checks and balances.”¹⁷⁶

The textual interpretations of the constitutional provisions for recess appointments and Article III judicial independence do not create a clear conclusion for the proper balance of the two provisions. The carefully constructed constitutional language of the Recess Appointments Clause deserves a more searching textual inquiry than any court has provided to date. In the end, the “possible textual interpretations are neither conclusive nor obvious from the language of the provisions. The conflict between the plain language and apparent requirements of articles II and III may be resolved only by looking beyond the text.”¹⁷⁷

A vital aspect of this inquiry beyond the text is the conflict between the Framers’ desire for efficiency embodied in the Recess Ap-

¹⁷³ Carrier, *supra* note 13, at 2219 (emphasis omitted). *But see* Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 411 (2005) (contending that “[t]here are substantial difficulties with these textual arguments”).

¹⁷⁴ Carrier, *supra* note 13, at 2220 (emphasis omitted) (quoting U.S. CONST. art. I, § 3, cl. 2).

¹⁷⁵ *Id.* at 2220–21.

¹⁷⁶ *Id.* at 2227.

¹⁷⁷ Virginia L. Richards, Note, *Temporary Appointments to the Federal Judiciary: Article II Judges?*, 60 N.Y.U. L. REV. 702, 712 (1985).

pointments Clause and the importance of an independent judiciary affirmed by Article III.

Given that the language of the two clauses is in conflict and that the intentions of the Framers are unclear, the principles that animate the salary and tenure provisions of Article III—judicial independence and separation of powers—clearly outweigh the concerns of expediency and efficiency that underlie the Recess Appointments Clause. In other words, if we were writing on a clean slate, if we were reviewing Judge Heen’s recess commission without history to support it, I find it inconceivable that we would interpret the Constitution as the majority does today—subordinating Article III values to the executive’s general power to make recess appointments.¹⁷⁸

2. *The Importance of an Independent Judiciary and the Misreading of Legislative History*

Judges sitting by recess appointment lack one of the most vital aspects of judicial authority. “There is a broad sense that a recessed appointee, even though officially and legally in the job, just doesn’t carry the aura of someone given the Senate stamp of approval.”¹⁷⁹ As has often been noted, judges have no army or police force to enforce their decrees. They rely entirely upon the other branches and the respect given their position to ensure enforcement. If the judiciary is to be an effective force for societal order, it is imperative that its reputation be protected. Because recess appointees “would be making decisions with the prospect of a potential vote on their confirmation, decisions made by recess appointees may reflect a focus on personal political gain.”¹⁸⁰ The judiciary cannot afford this appearance of impropriety.

The importance of an independent judiciary has been stressed throughout American history.¹⁸¹ Yet the opinions upholding recess appointments of federal judges do little to address the potential lack of independence that recess appointees may possess. The temporary nature and lack of security held by recess appointees demonstrates “circumstances [that] are utterly at odds with the commitment to judicial independence reflected in Article III’s good behavior clause and salary protections.”¹⁸²

¹⁷⁸ *United States v. Woodley*, 751 F.2d 1008, 1024 (9th Cir. 1985) (Norris, J., dissenting).

¹⁷⁹ Kamen, *supra* note 146, at A11.

¹⁸⁰ John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543, 567 (2005).

¹⁸¹ *See, e.g., Woodley*, 751 F.2d at 1018 (examining the Framers’ early goal of an independent judiciary).

¹⁸² Herz, *supra* note 19, at 450.

In examining the purposes of Article III, the Supreme Court has found both a public and a private function. The public function of courts is structural, serving to check “the other parts of government as they might try to expand their power beyond constitutionally assigned limits.”¹⁸³ The judiciary of the United States is often asked to uphold the separation of powers both between the competing branches of government, and between the federal government and the states. In order to ensure that this task is properly carried out, Article III eliminates controls that the executive and legislative branches may have over the judiciary. Recess appointments reinstate these executive and legislative controls, making judges dependent on competing branches of government for salary as well as continuance in office.

As important as Article III’s public/structural purpose is to the separation of powers, the private right granted by Article III is even more vital to individual liberty and our faith in a fair judiciary. “That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.”¹⁸⁴ Lifetime tenure and guaranteed compensation create a “personal guarantee of an independent and impartial adjudication . . .”¹⁸⁵ This private right guarantees that litigants will “have claims decided before judges who are free from potential domination by other branches of government.”¹⁸⁶

Commentators who support the constitutionality of judicial recess appointments have equated a judge’s life tenure to constitutional provisions regarding six-year Senate terms and the President’s four-year term, noting that there are exceptions to these provisions.¹⁸⁷ Such a comparison misses the vital importance of lifetime tenure in the constitutional scheme. While a term of six years versus a term of five years may have some limited impact upon a senator’s voting, and therefore public rights, this impact is miniscule compared to the difference between life tenure and a temporary appointment. Further-

¹⁸³ Mayton, *supra* note 18, at 528 (citing *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847 (1986)).

¹⁸⁴ THE FEDERALIST NO. 78, at 470–71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁸⁵ Mayton, *supra* note 18, at 528 (quoting *Commodity Futures Trading Comm’n*, 478 U.S. at 847)).

¹⁸⁶ *Id.* at 529 (quoting *Commodity Futures Trading Comm’n*, 478 U.S. at 847).

¹⁸⁷ Hartnett, *supra* note 173, at 440 (“But unless one thinks that life tenure for Article III judges is somehow more central to the constitutional scheme than two year terms for Article I Representatives, six year terms for Article I Senators, and four year terms for Article II Presidents, it should be no more troubling that some Article III judges lack life tenure than that some Representatives have terms shorter than two years, some Senators have terms shorter than six years, and some presidents have terms shorter than four years.”).

more, the value of an independent judiciary in the constitutional framework relies on life tenure in a way that other offices do not.¹⁸⁸

Critics of the importance of life tenure have cited the Constitution's failure to prevent lower court judges from aspiring to higher positions.¹⁸⁹ While judges with lifetime appointments may continue to exhibit aspirations for higher office, the lifetime tenure provision's most important aspect is its guarantee of permanent job security.¹⁹⁰

The three appellate court opinions regarding the recess appointments of federal judges¹⁹¹ provide very little discussion of how to balance the inherent conflict between the Recess Appointments Clause and the importance of lifetime tenure and guaranteed compensation. While "[t]he contemporaneous writings of the Framers are virtually barren of any references to the Recess Appointments Clause[,] . . . the historical record is a cornucopia of references to the principle of life tenure enshrined in Article III."¹⁹² Given the importance of judicial independence to the Founding Fathers, who stated their dissatisfaction with English judges prominently in the Declaration of Independence,¹⁹³ it is reasonable to assume that had they intended the recess appointment power to undercut the Senate's role of advice and consent, the topic would have been seriously debated.

The legislative histories of the conflicting provisions provide strong support for either of two conflicting interpretations: "that the recess appointments clause was intended as a limited exception to Article III's tenure and salary provisions, or that the tenure and salary provisions are absolute requirements and the recess appointments clause was therefore not intended to extend to vacancies in the federal judiciary."¹⁹⁴ In either case, this conflict deserves more discussion than the gloss-over provided by the three opinions to address this conflict.¹⁹⁵

¹⁸⁸ See FISHER, *supra* note 146, at CRS-16 ("Moreover, it could be argued that the Constitution 'guarantees litigants a trial before lifetime judges.'") (quoting STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 96, at iii).

¹⁸⁹ See, e.g., Hartnett, *supra* note 173, at 440 (describing the aspirations of judges and justices despite life tenure).

¹⁹⁰ *Id.* Hartnett may be correct in citing Bruce Springsteen that "Poor man wanna be rich, rich man wanna be king, And a king ain't satisfied till he rules everything." *Id.* (quoting Bruce Springsteen, *Badlands*, on DARKNESS ON THE EDGE OF TOWN (Sony Records 1978)). However, the power of ambition to influence decision pales in comparison to the need for security.

¹⁹¹ See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004); *United States v. Woodley*, 726 F.2d 1328 (9th Cir. 1984), *rev'd en banc*, 751 F.2d 1008 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962).

¹⁹² *Woodley*, 751 F.2d at 1017-18 (Norris, J., dissenting).

¹⁹³ THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

¹⁹⁴ Curtis, *supra* note 21, at 1773.

¹⁹⁵ See *Evans*, 387 F.3d at 1220; *Woodley*, 726 F.2d at 1328, *rev'd en banc*, 751 F.2d at 1008; *Allocco*, 305 F.2d at 704.

The undermining of the Founders' ideal of an independent judiciary was most apparent during the confirmation hearings of Justice Brennan. Before the Supreme Court, on which Brennan sat as a recess appointee, were several cases regarding the Communist Party. Justice Brennan tried to avoid speaking about pending cases, but was pressed by Senator McCarthy:

[T]he question was simple. You have not been confirmed yet as a member of the Supreme Court. There will come before that Court a number of questions involving the all-important issue of whether or not communism is merely a political party or whether it represents a conspiracy to overthrow this Government.

I believe that the Senators are entitled to know how you feel about that¹⁹⁶

The specter of a judge ruling on important cases without the protections of lifetime tenure was also raised by other Eisenhower recess appointments. Chief Justice Warren was urged not to hear arguments in the *Brown v. Board of Education* cases while he remained a recess appointee. Harvard Professor Henry Hart wrote that doing so would "violate the spirit of the Constitution, and possibly also its letter."¹⁹⁷ During this same period, two recess appointees to the Fifth Circuit chose not to sit on controversial civil rights cases until after their confirmations.¹⁹⁸

In 1959, the third Eisenhower Supreme Court recess appointee, Justice Potter Stewart, also faced troubling questions as a sitting Supreme Court Justice. During his nomination hearing, Justice Stewart faced a withering examination by southern senators upset by the Supreme Court's ruling in *Brown v. Board of Education*.¹⁹⁹ "That the on-the-bench performance of a recess appointee will indeed be reviewed by the Senate is indicated by the confirmation debate on Judge Gregory, where it was noted that 'His performance on the bench since his [recess] appointment has been uniformly praised.'²⁰⁰

The notion of a sitting Supreme Court Justice or any other sitting federal judge defending his views and rulings before congressional scrutiny in order to maintain his position is antithetical to the pur-

¹⁹⁶ *Hearings Before the S. Comm. on the Judiciary on Nomination of William Joseph Brennan, Jr.*, 85th Cong. 18 (1957) (statement of Senator McCarthy), *quoted in Constitutional but Unwise?*, *supra* note 139, at 124.

¹⁹⁷ Gary J. Edles, *Temporary Judges: Recent Developments in the United States and Great Britain*, 48 *FED. LAWYER*, July 2001, at 12 (quoting Hart, *supra* note 165, at 2).

¹⁹⁸ *Id.* at 12.

¹⁹⁹ See Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 *RUTGERS L. REV.* 383, 404–05 (2000) (quoting 147 *CONG. REC.* S7988 (2001)) (detailing segregationist senators' questions for Justice Stewart during his hearing before the Senate Judiciary Committee).

²⁰⁰ Mayton, *supra* note 18, at 530 n.51 (quoting 147 *CONG. REC.* S7988 (2001) (statement of Senator Leahy)).

poses of Article III and reveals the troubling potential of recess appointments.

Recent Supreme Court cases further illustrate the extreme danger posed by recess appointees to the federal bench. While many commentators questioned the motivations behind the Supreme Court's decision in *Bush v. Gore*,²⁰¹ the crush of commentary questioning the motivations of a recess appointee on such a panel would have been overwhelming. The protections of lifetime tenure and guaranteed compensation insulated the Court from a great deal of criticism following its decision in the 2000 election. If a recess appointee had cast the deciding vote in the case, any semblance of political neutrality by the judiciary would have been stripped away.

In a post-September 11th world, the Recess Appointments Clause has been defended as a necessary mechanism by which judicial continuity can be assured in a time of crisis.²⁰² In times of great crisis, the executive and legislative branches react to the immediate concerns of the nation and its people. While often these reactions do much to improve the national condition, abuses occur more easily during national emergencies.²⁰³ With public opinion firmly behind the actions of the government in a time of crisis, only independent courts have the ability to consider the constitutionality of arrests and detentions.²⁰⁴ Temporary judges, reliant upon a wartime President for nomination and a wartime Senate for confirmation, may be loathe to act in a politically unpopular way.

It is vital, when our nation is most vulnerable to the corruption of national panic, to maintain a judiciary free from political and popular influence. The three circuit court opinions that considered this issue have failed to recognize both the importance of an independent judiciary and the degradation of independence created by recess appointments.

²⁰¹ 531 U.S. 98 (2000).

²⁰² See, e.g., Randolph Moss & Edward Siskel, *The Least Vulnerable Branch: Ensuring the Continuity of the Supreme Court*, 53 CATH. U. L. REV. 1015, 1021–23 (2004) (arguing for the necessity of ensuring continuity on the Supreme Court in the event of a large-scale terrorist attack or similar crisis).

²⁰³ See Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571 *passim* (2002) (detailing restrictions on civil liberties in the wake of World War II and the terrorist attacks of September 11, 2001).

²⁰⁴ It is important to remember the effects of crisis upon the population. During World War II, 93% of Americans supported President Roosevelt's decision to intern Japanese-Americans. See Vincene Verdun, *If the Shoe Fits Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 649 n.146 (1993) (citing PUBLIC OPINION 1935–1946, at 380 (Hadley Cantril ed., 1951)).

3. Historical Practice

Each of the three opinions upholding the constitutionality of recess appointments relies upon the strength of historical practice. Assuming, *arguendo*, that historical practice supports presidential recess appointments to the federal bench, the constitutional analysis is hardly complete.²⁰⁵ Historical practice, while persuasive, does not create constitutional validity. “[T]he federal judiciary must reject any unconstitutional construction by another branch of government regardless of the number of years the construction has been upheld.”²⁰⁶

A reevaluation of the constitutionality of recess appointments is necessary in light of the new purposes recess appointments are serving. Throughout the last twenty-five years, judicial appointments have become increasingly politicized.²⁰⁷ So, too, has the use of recess appointments. In comparing modern appointments to past recess appointments, one commentator noted that Chief Justice Earl Warren and Associate Justice William Brennan “received their appointments not because of a constitutional impasse due to the intransigence of a minority of senators, but because it was necessary to have a full strength judiciary and the recess appointment method permitted this.”²⁰⁸ This comparison of modern and past recess appointments indicates a shift in underlying purpose. Such alteration should spur a reevaluation of constitutionality.²⁰⁹

The Supreme Court’s willingness to strike down that which it views as unconstitutional, regardless of how longstanding the practice may be, is well established.²¹⁰ The constitutionality of recess appointments can be seen as a struggle between the concerns for separation of powers and efficiency. Even where longstanding-use and practical-efficiency arguments are present, the Court has found the separation of powers an overriding concern.²¹¹

There are three main limitations on the use of historical practice as “evidence of a structural accommodation.”²¹² First, regardless of

²⁰⁵ See *supra* note 27 and accompanying text.

²⁰⁶ Richards, *supra* note 177, at 715.

²⁰⁷ See, e.g., William P. Marshall, *The Judicial Nominations Wars*, 39 U. RICH. L. REV. 819 *passim* (2005) (examining the sources of recent divisiveness surrounding judicial nominations).

²⁰⁸ Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 901 (2005) (citing Buck et al., *supra* note 22, at 4–14).

²⁰⁹ But see Hartnett, *supra* note 173, at 407 (arguing that we should not abandon the traditional interpretation of the Recess Appointments Clause).

²¹⁰ See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (striking down the longstanding practice of segregation in public schools).

²¹¹ See, e.g., Richards, *supra* note 177, at 717 (citing *INS v. Chadha*, 462 U.S. 919 (1983)) (noting that the Supreme Court in *Chadha* gave priority to separation-of-powers concerns over considerations of efficiency).

²¹² Curtis, *supra* note 21, at 1783.

historical practice, “the independent law-declaring function of the courts stands on its most solid footing when private liberty and property rights are at stake.”²¹³ When considering an individual litigant’s private right to have his or her case heard before a fair and impartial trier of fact, recess appointments fit this category. Second, as in *INS v. Chadha*, congressional and presidential action must stay “within the broad confines of the constitutional text and structure” to maintain constitutionality.²¹⁴ In the case of recess appointments, the conflict between the clauses creates confusion, but the provisions of Article III are very clear in their requirements. Finally, courts should not give effect to structural accommodations that do not work.²¹⁵ While there has been no constitutional crisis regarding recess appointments, any court that examines the record can observe a growing discontent with the process and anger at its alleged abuse.²¹⁶

The historical record is also mistakenly used, in an argument of negative implication, as demonstrative of the minimal threat to the constitutional order posed by recess appointments. *Allocco* and *Woodley* both cite a historical record allegedly devoid of executive branch abuse.²¹⁷ The fear that a recess appointee would be a “lion under the throne” of the executive branch²¹⁸ should not be dismissed on the slim foundation that such evils have not occurred in the past. By this reasoning, a future court might find that a recess appointee who was, in its opinion, unduly influenced by the President lacks jurisdiction while a similarly situated judge who was not unduly influenced has jurisdiction and may exercise Article III powers. As a jurisdictional question, establishing the Article III credentials of a judge is an initial hurdle, to be asked prior to any further evaluation of underlying judicial motives.

The constitutional protections of lifetime tenure and guaranteed compensation do not exist as a background cause for dismissal if a judge is unfairly influenced or coerced. They stand, rather, as a guarantee to all litigants that the judge hearing their case will be independent from executive and legislative branch influence. By relying upon arguments such as that of Attorney General Wirt, that recess appointments “cannot possibly produce mischief, without imputing to the President a degree of turpitude entirely inconsistent

²¹³ *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, (1803)).

²¹⁴ *Id.* For example, in *Chadha*, the Court struck down a longstanding Congressional procedure whereby one house of Congress could exercise a “one-House veto.” 462 U.S. at 959.

²¹⁵ Curtis, *supra* note 21, at 1784.

²¹⁶ See *infra* notes 257–62 and accompanying text.

²¹⁷ See *United States v. Allocco*, 305 F.2d 704, 709 (2d Cir. 1962), cited with approval in *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (“The evils of legislative and executive coercion which petitioner foresees have no support in our nation’s history.”).

²¹⁸ *Woodley*, 751 F.2d at 1014.

with the character which his office implies,"²¹⁹ the *Allocco* court misses the jurisdictional nature of the question. The question is not the "turpitude" exhibited in a particular case, but the jurisdiction of a judge without lifetime tenure to hear a matter designated to an Article III court.

As the justifications for recess appointments have shifted from ensuring a functioning judiciary during long intersession recesses to a presidential tool used to fight what Presidents see as the obstructionist tactics of the Senate,²²⁰ the courts must also shift their view as to the potential for abuse.

If the Recess Appointments Clause is read as the appellate courts have thus far understood it, the President has absolute power to appoint judges to fill Supreme Court and lower federal court vacancies regardless of Article III concerns. These recess appointees then serve until the end of the "next Session" of Congress.²²¹ At the end of that session, the office would again be vacant and the President free to make another recess appointment.

If discord between the President and Senate were to continue, and judicial nominations reached an impasse from which neither branch of government would yield, it is not inconceivable that the President would bypass the Senate advice and consent altogether and fill the federal judiciary using the recess appointment power.²²² Daisy-chaining appointments together in this manner would decimate the independence of the federal judiciary. Attorney General opinions foresaw the potential of this power and have approved of its constitutionality.²²³ While a federal judiciary devoid of any Article III protections and composed entirely of temporary recess appointees may seem unlikely, it is one logical derivative of the current state of the law.

²¹⁹ *Allocco*, 305 F.2d at 714 (quoting Executive Authority to Fill Vacancies (1823), *supra* note 43, at 634).

²²⁰ See *supra* notes 78–84 and accompanying text regarding judicial appointments by President Clinton and President George W. Bush.

²²¹ U.S. CONST. art. II, § 2, cl. 3.

²²² While this scenario seems improbable, a smaller scale conflict may be easier to envision. A President and Senate of different political parties and each ideologically wedded to one side of a particular issue, such as abortion, may find it impossible to agree upon a single candidate, leading to a recess appointment.

²²³ See Mayton, *supra* note 18, at 544 (noting Attorney General Stanbery's belief that "[a]s these appointments are to continue until the end of the next session of the Senate, the President might omit to make any nomination to the Senate, and then, in the ensuing recess, reappoint the same or other officers, and thus throughout his term of office defeat entirely any participation on the part of the Senate" (quoting President's Power to Fill Vacancies (1866), *supra* note 53, at 40)). In theory, this scenario could be made even worse by responsive action by the Senate. It is arguable that the Senate could redefine the length of a "Session" of Congress. The Senate could reconvene and recess repeatedly to end the term of recess appointees. This action could again be countered by presidential recess appointments, creating a constitutional crisis.

The constitutionality of recess appointments to the federal bench is in need of a fresh evaluation. “[O]ccasional practice backed by mere assumption cannot settle a basic question of constitutional principle.”²²⁴ A fair evaluation must free itself from the assumed and exaggerated weight of history and practice, which has prejudiced scholars and judges in favor of continuing to allow recess appointees to serve as a special brand of temporary Article III judges. However, a fair appraisal of the competing constitutional principles at work in a recess appointment would yield a different result, protecting individual litigants as well as the constitutional system of checks and balances.

4. Cascade Effect and Failure to Examine Underlying Values

Precedential cascades can occur without intentional harm. A cascade begins when a court of appeals resolves a genuinely difficult question. A second court relies upon this holding, even if they may have leaned in another direction. As the precedent builds, a third court of appeals may disagree with the earlier courts, but “lacks the confidence to reject the shared view of its two predecessors. Eventually all circuits come into line”²²⁵ The result of a cascade is that “[b]ecause all of the courts of appeals are in agreement, the Supreme Court finds it unnecessary to rule on the issue.”²²⁶

A precedential cascade can be seen in the circuit court opinions regarding judicial recess appointments. The analysis of the constitutional conflict in *United States v. Alocco* was brief; it quoted heavily from and relied in great part upon prior Attorney General opinions.²²⁷ These opinions built upon one another, relying upon earlier positions rather than independent analyses.²²⁸ Over time, the weight of earlier opinions took on great significance as “historical practice” and Attorney General opinions concentrated less on the examination of conflicting constitutional clauses.

Alocco has since become the authoritative case regarding the propriety of recess appointments. *Alocco* relied on Attorney General opinions in support of the court’s position and historical practice. In addition, *Alocco* claims that “*In re Farrow* which had affirmed the President’s power to make appointments to vacancies occurring during the Senate session, was the only reported judicial decision on the recess appointments clause.”²²⁹ There are, however, several earlier

²²⁴ Hart, *supra* note 165, at 2.

²²⁵ CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 59 (Harvard Univ. Press 2003).

²²⁶ *Id.*

²²⁷ 305 F.2d 704, 713 (2d Cir. 1962).

²²⁸ See *supra* Part II.

²²⁹ Chanen, *supra* note 41, at 209; see also *In re Farrow*, 3 F. 112 (C.C.N.D. Ga. 1880).

decisions that call into doubt *Allocco's* reliance upon *In re Farrow*, and the conclusion that judicial acceptance has been absolute. *Allocco's* claim that *In re Farrow* is the only decision regarding recess appointments is "patently incorrect; the court failed to cite *District Attorney, Peay v. Schenk*, or *In re Yancey*. This omission is a grievous error, for in that one stroke, Judge Kaufman erased all vestiges of these earlier cases."²³⁰

Subsequent decisions by the Ninth and Eleventh Circuits, upholding recess appointments, and the Supreme Court's decision to deny certiorari have followed the pattern predicted by Sunstein's cascade theory.²³¹ As a result of the cascade effect, judicial opinions in this area rely heavily upon historical acceptance, which itself is called into doubt by a more thorough analysis.²³²

The opinions of the circuit courts have also relied upon a misguided theory of efficiency. These opinions

failed to consider the competing purposes served by articles II and III and treated historical practice as the dispositive factor in its analysis. These serious analytical flaws in both opinions resulted in an abdication of the courts' position as final arbiter of constitutional meaning. Further, the 1962 *Allocco* opinion predated the 1965–1980 recess appointment hiatus, recent Supreme Court opinions that criticize a bare "historical consensus" argument, and other Supreme Court opinions that emphasize the fundamental importance of article III protections.²³³

The precedential cascade that extends from the earliest Attorney General opinions on this subject to the Supreme Court's recent denial of certiorari has prevented a full exploration of the constitutional conflict between Article III and the Recess Appointments Clause.²³⁴ If historical practice were set aside from the recess appointments debate, what would remain is two clauses clearly in conflict.

In comparing underlying values, a litigant's right to a fair and impartial trial should trump the justifications given for the recess appointment power. Efficiency and the ability of the President to expediently choose judges does not rise to the level of a fundamental right, as does the private right to a fair and impartial trier of fact.

²³⁰ *Id.*

²³¹ See *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc) (citing *Woodley* and *Allocco* approvingly).

²³² See *supra* Part II.B. (discussing the Senate's repeated objections to the President's use of the recess appointment power).

²³³ Richards, *supra* note 177, at 709.

²³⁴ But see *United States v. Woodley*, 726 F.2d 1328, 1329 (9th Cir. 1984), *rev'd en banc*, 751 F.2d 1008 (9th Cir. 1985) (stating that the issue to address is the "inherent tension" between the Recess Appointments Clause and Article III); *Woodley*, 751 F.2d at 1015 (Norris, J., dissenting) (criticizing the majority for ignoring the need to balance the constitutional matters in question).

This concern for judges free from legislative and executive influence becomes even more acute during times of crisis.²³⁵

D. Constitutional Validity of a Sitting Judge Facing Senate Confirmation

Article III's protections of lifetime tenure and guaranteed compensation are intended to operate as a shield. Once appointed, Article III judges need not answer to the executive branch, the legislature, or the electorate. A recess appointee, however, does not possess these protections. "[B]oth the Court, the appointees, and the Senate are handicapped by an appointee assuming duties prior to confirmation."²³⁶

A judge who hears cases prior to confirmation is "subject to subtle pressures which should not be permitted to exist."²³⁷ While evaluating the credentials of a sitting recess appointee, the Senate will in all likelihood examine a recess appointee's record on the bench. Thus, recess appointments lead the Senate to engage in the very ex-post inquiries that Article III was designed to prohibit.²³⁸

The "subtle pressures" Senator Mahoney spoke of in 1960 cause a corruption of both the public and private rights that Article III was intended to protect. The public right of an independent judiciary is referenced repeatedly in the *Federalist Papers* and in other defenses of the American constitutional system's reliance on independent judges.²³⁹ The antithesis of independence is displayed when a sitting judge is forced to answer questions before the Senate, while simultaneously acting to appease a President who has the power to withdraw his nomination.

The unconstitutional nature of questioning a sitting judicial officer does not only lie in the public right created by Article III and structural concerns for the checks and balances guaranteed by the Constitution. Additionally, individual litigants are prejudiced when a decision contrary to public opinion could place a judge's career and

²³⁵ See *supra* notes 202–04 and accompanying text.

²³⁶ 106 CONG. REC. 14, 18132 (1960) (statement of E. Blythe Stason, Dean, University of Michigan Law School).

²³⁷ 106 CONG. REC. 14, 18134 (1960) (statement of Senator Joseph C. O'Mahoney).

²³⁸ See, e.g., *Hearings Before the S. Comm. on the Judiciary on Nomination of William Joseph Brennan, Jr.*, 85th Cong. 17–18 (1957) (statement of William Joseph Brennan, Jr., Nominee to be Associate Justice of the Supreme Court of the United States) (quoting Justice Brennan, then sitting as a recess appointee, being questioned intensely by Senator McCarthy about whether Communism "represents a conspiracy to overthrow" the government of the United States).

²³⁹ See, e.g., THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("This independence of the judges is equally requisite to guard the Constitution and the rights of individuals . . .").

current office in jeopardy. A recess appointee “serve[s] at the pleasure of the President and the Senate,”²⁴⁰ reliant upon:

(1) [T]he decision of the President to forward his nomination to the Senate; (2) the decision of the President not to withdraw the nomination before it has been acted upon; and (3) the decision of the Senate to confirm the nomination. The Senate will be entirely free . . . to postpone its action until near the close of the session in order to see how the new nominee is going to vote.²⁴¹

A temporary recess appointee—at risk for evaluation and punishment by the Senate and President—is in no sense an Article III judge. “A judge receiving his commission under the recess appointment clause may be called upon to make politically charged decisions while his nomination awaits approval by popularly elected officials. Such a judge will scarcely be oblivious to the effect his decision may have on the vote of these officials.”²⁴² Therefore, decisions made by judicial officers acting without Article III protections must be declared unconstitutional.²⁴³

On few other points in the Constitutional Convention were the framers in such complete accord as on the necessity of protecting judges from every kind of extraneous influence upon their decisions . . . [A judge] cannot possibly have [the] independence [intended by Article III] if his every vote, indeed his every question from the bench, is subject to the possibility of inquiry in later committee hearings and floor debates to determine his fitness to continue in judicial office.²⁴⁴

IV. POLITICAL IMPLICATIONS OF RECESS APPOINTMENTS—ALTERATION OF SENATE POWER

“Advice and consent” implies an ex-ante evaluation of the qualifications of a judicial nominee. The question before the Senate during traditional confirmation hearings is whether a nominee is fit for service on the federal bench. A recess appointment reframes the question before the Senate: has the nominee’s performance during his recess appointment been so egregious that the Senate feels it necessary to remove him or her from the bench?

This transition from ex-ante to ex-post review is a dangerous paradigm shift of questionable constitutional validity. In effect, a vote in which a recess appointee is not confirmed to a permanent position

²⁴⁰ *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc) (Norris, J., dissenting), cert. denied, 475 U.S. 1048 (1986).

²⁴¹ *Woodley*, 751 F.2d at 1016 (Norris, J., dissenting) (quoting Hart, *supra* note 165, at 2).

²⁴² *United States v. Woodley*, 726 F.2d 1328, 1330 (9th Cir. 1984), *rev’d en banc*, 751 F.2d 1008 (9th Cir. 1985).

²⁴³ Cf., e.g., *Nguyen v. United States*, 539 U.S. 69, 83 (2003) (invalidating the judgment of an improperly constituted Court of Appeals).

²⁴⁴ Hart, *supra* note 165, at 2.

amounts to removal without the constitutional protections of impeachment by the House of Representatives and trial by the Senate.²⁴⁵ In addition to harming the independence of the judiciary, ex-post review handicaps the Senate and alters the nature of its constitutional duty.

A. *Power of the Senate Diminished*

The Senate's position of strength in a traditional confirmation hearing is diminished in three ways by recess appointments. First, it is diminished by the fear that a failure to confirm will result in a recess appointment that could embarrass those senators who disagree with the President.²⁴⁶ Second, the Senate can be forced to consider nominees on a timetable dictated by the President. Finally, when evaluating a recess appointee, the endowment effect may push the Senate toward approval.

To avoid additional recess appointments toward the end of President George W. Bush's first term in office, Senate democrats allowed votes on twenty-five lower federal court judges.²⁴⁷ While previous administrations discussed recess appointment compromises with the Senate, these agreements did not force the Senate to consider nominees.²⁴⁸ The new agreement may not appear to be of great consequence; it does, however, represent a significant encroachment by the executive branch into the Senate's agenda.

The endowment effect illustrates the higher value individuals place on current possessions in comparison to hypothetical purchases.²⁴⁹ The reluctance to change illustrated by the endowment effect may provide great advantages in the confirmation of sitting re-

²⁴⁵ See U.S. CONST. art. II, § 4 ("[A]ll civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."); U.S. CONST. art. I, § 2, cl. 5 (affording the impeachment power to the House of Representatives); U.S. CONST. art. I, § 3, cl. 6 (affording the power to try impeachments to the Senate).

²⁴⁶ There is a great deal to be lost politically when the Senate is shown to lack power in comparison to the executive branch. See, e.g., Mike Allen, *President Outmaneuvers Senator on Base Closings*, WASH. POST, Apr. 3, 2005, at A6 (describing a recent occurrence of executive action diminishing Senate strength by way of a recess appointment).

²⁴⁷ See David A. Yalof, *Dress Rehearsal Politics and the Case of Earmarked Judicial Nominees*, 26 CARDOZO L. REV. 691, 692 (2005) (considering instances when recess appointments appear to be pretext for future nomination for positions on higher courts).

²⁴⁸ See FISHER, *supra* note 146, at CRS-10-CRS-11 (citing agreements made by Senator Byrd with the Reagan administration and Senator Mitchell with the administration of George H. W. Bush).

²⁴⁹ See Russell Korobkin, *Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior*, 97 NW. U. L. REV. 1227, 1228 (2003) (discussing how the endowment effect can be useful in legal polity analysis).

cess appointees. By granting some judges this beneficial position, the Senate's role is de-emphasized.

As a Senator, John Quincy Adams recognized the tactically advantageous position a nominee holds when he already occupies a proposed post. "Provisional appointments,' he wrote, might be made during a recess of the Senate, so that 'when the Senate meet [sic], the candidates proposed to their consideration are already in possession of the office to which they are to be appointed.'"²⁵⁰

When the role of the Senate is diminished, the role of the President is correspondingly aggrandized. Even if, as some have suggested, the Senate has acquiesced to judicial recess appointments, this does not cloak recess appointees in a shield of constitutionality, preventing separation of powers challenges.²⁵¹ "The [Supreme] Court has made clear that the consent of the 'losing' branch does nothing to validate a shift in power between the legislative and executive branches."²⁵²

B. Failure of the Separation of Powers—A Shift from Institutional Competition Between Branches of Government to Political Competition

If recess appointments to the federal bench shift power away from the Senate and towards the President, why has there been no widespread outcry by the legislative branch against the use of recess appointments?

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.²⁵³

The lack of outrage generated by this presidential assumption of power is part of a larger shift in the way power is balanced across the federal government.

The appointment power is one of the many areas in which executive and legislative power overlap. The precise definition of "advice and consent" is unclear and allows for variations in the amount of control and influence exercised by the Senate. Historically, this imprecise constitutional term has left the Senate and President to de-

²⁵⁰ Mayton, *supra* note 18, at 516 (quoting JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY ON THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 255 (Greenwood Press 1968) (1953)) (Harris is incorrectly cited in Mayton; this parenthetical indicates the correct citation).

²⁵¹ See *supra* Part II.B. (discussing the Senate's repeated objections to the President's use of the recess appointment power).

²⁵² Levinson, *supra* note 42, at 958.

²⁵³ Herz, *supra* note 19, at 460.

bate the terms and conditions of appointments with an eye toward institutional power.²⁵⁴

In recent years, however, the debate over judicial appointments has concerned partisan politics to a much greater degree than it has concerned institutional power. Senator Lindsey Graham (R-SC) is representative of this change in focus. Upon hearing of the President's decision to bypass the Senate, Senator Graham stated that he "applaud[s] the president's decision to appoint [William] Pryor to the federal bench."²⁵⁵ Graham stated that Judge Pryor had been an "outstanding attorney general" held up by "partisan filibusters of judges driven by liberal special interest politics."²⁵⁶ In effect, what Senator Graham advocated is presidential usurpation of the Senate's prerogative, a diminution of his own power as a United States senator. Today, there are few voices in the Senate willing to protect the Senate's prerogative of advice and consent against presidential encroachment, regardless of party.

After the recess appointment of Roger Gregory, no criticism was heard from Senate democrats criticizing the end-run around their authority. Despite their silence during the Clinton administration, Senate democrats now raise their voices in protest against republican recess appointments to the federal bench. Referring to the appointments of Judge Pryor and Judge Pickering, Senator Charles Schumer (D-NY) characterized democrats as having "always felt [recess appointments] violated the spirit if not the letter of the Constitution."²⁵⁷ It is noticeable that despite "always" feeling that recess appointments violated the Constitution, democrats were universally silent in the face of a democratic President's use of the Recess Appointments Clause.

Republican senators have been equally duplicitous regarding the validity of recess appointments. While Senate republicans showed great concern for their institutional authority during the Clinton administration, no republican senatorial voices have been raised in opposition to the Bush administration's use of recess appointments.²⁵⁸ After President Clinton used a recess appointment to name Judge Roger Gregory to the Fourth Circuit, a leading republican senator,

²⁵⁴ See Moe & Howell, *supra* note 40, at 144 (describing the debate over institutional power).

²⁵⁵ Al Kamen, *Planting the Cedars on Iraq*, WASH. POST, Feb. 25, 2004, at A23.

²⁵⁶ *Id.*

²⁵⁷ Helen Dewar, *President, Senate Reach Pact on Judicial Nominations*, WASH. POST, May 19, 2004, at A21.

²⁵⁸ Levinson, *supra* note 42, at 953 n.148 ("Objections to this unusual . . . usurpation of the Senate's customary say in judicial appointments have been limited to Senate Democrats." (citing Neil A. Lewis, *Bush Seats Judge After Long Fight, Bypassing Senate*, N.Y. TIMES, Jan. 17, 2004, at A1; Neil A. Lewis, *Bypassing Senate for Second Time, Bush Seats Judge*, N.Y. TIMES, Feb. 21, 2004, at A1)).

James Inhofe, announced “that he would block any effort to confirm Gregory for a lifetime appointment, [and] called it ‘outrageously inappropriate for any president to fill a federal judgeship through a recess appointment in a deliberate way to bypass the Senate.’”²⁵⁹

An additional factor in the current debate, and a new avenue for Senate hypocrisy, is the use of the filibuster. Senate Majority Leader Bill Frist has called the use of filibusters an “unfortunate break with more than 200 years of Senate tradition.”²⁶⁰ Frist, who claims to view the use of filibusters for judicial nominees as intolerable, has gone so far as to threaten to disallow filibusters under Senate rules, a procedural tactic widely regarded as the “nuclear option.”²⁶¹

Claims of institutional protection for the President’s right to appoint judges ring hollow in light of past proceedings. Judge Richard Paez of the Ninth Circuit waited more than four years for his confirmation by the Senate. Originally nominated by President Clinton in 1996, Judge Paez faced an attempted filibuster to his nomination. Among those voting against cloture, in an attempt to prevent a vote and continue a filibuster, were fourteen republicans, including current Senate Majority Leader Bill Frist.²⁶²

“[T]he President and the Senate have, [T]rom time to time, debated the limits of the Constitutional [Recess Appointments] [C]ause and what actions are constitutional.”²⁶³ Rarely, however, in a time of unified government, defined as one party controlling both the Congress and presidency, are institutional battles fought. Instead of viewing the current recess appointment debate in terms of institutional power, republican senators, “like President Bush, view recess appointments as one response to the frustrations of Democratic filibusters.”²⁶⁴ When the Congress and the President find themselves at odds concerning a question of institutional strength and separation of powers, one branch has traditionally conceded defeat in exchange for political gain, and that branch has rarely been the executive. While there are times when Congress and the President do battle for power, today these battles occur “only when they have been pressed into the service of someone’s independent political agenda, not be-

²⁵⁹ FISHER, *supra* note 146, at CRS-23 (quoting Neil A. Lewis, *Senator Vows He Will Fight Clinton’s Judicial Selection*, N.Y. TIMES, Dec. 29, 2000, at A16).

²⁶⁰ Kevin Drum, *Resist the Filibuster Fiat*, WASH. POST, Jan. 31, 2005, at A21.

²⁶¹ See Charles Babington, *Specter Predicts Turmoil May Grow from Impasse: Senator Blames Both Sides for Stalemate on Judges*, WASH. POST, Feb. 25, 2005, at A4.

²⁶² See *Cloture Motion for Nominations of Marsha L. Berzon and Richard A. Paez*, 106th Cong., 146 CONG. REC. S1225 (2000) (voting 85–14 for cloture, the majority brought the nomination to a vote).

²⁶³ Senator Orrin G. Hatch, *At Last a Look at the Facts: The Truth About the Judicial Selection Process: Each Is Entitled to His Own Opinion, But Not to His Own Facts*, 11 GEO. MASON L. REV. 467, 481 (2003).

²⁶⁴ Herz, *supra* note 19, at 460.

cause of anyone's intrinsic interest in the power of the institutions themselves."²⁶⁵

The recess appointment debate is part of a larger reshaping of the traditional separation of powers, which viewed each branch of government as a competitor for limited power. An updated view of the separation of powers and institutional competition would depict the President in his traditional power seeking position, but recognize that "for reasons rooted in the nature of their institutions" Congress is unlikely to fight against this expansion.²⁶⁶ As such, separation of power is divided along party lines rather than institutional lines.

Both republicans and democrats would be wise to remember that the party out of power will not remain the minority forever. "[T]he 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 . . ." ²⁶⁷ Democrats who applauded the use of a recess appointment to place Roger Gregory on the Fourth Circuit now watch as republicans use this same tactic to empower conservative judges. "In considering the scope of the [Recess Appointments] [C]ause . . . 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."²⁶⁸

The institutional realignment of the Senate places party above all else. The extreme partisanship regarding judicial nominations graphically illustrates the danger to a proper balance of power that party loyalty can present. The traditional separation of powers envisions questions of institutional power balancing resolved through the need by the branches of government to cooperate on other issues. If party loyalty overrides institutional loyalty, however, little protection remains for the minority party or the institution they seek to defend.

The role of partisan politics in judicial nominations is not new.²⁶⁹ In the eighteenth and nineteenth centuries, the Senate quickly discovered the power of confirmation.²⁷⁰ The Senate's motivation to act as an institution, asserting itself against executive encroachment, is not nearly as strong as its motivation to act in a partisan fashion to ensure nominees of a certain political stripe. "The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power—or,

²⁶⁵ Levinson, *supra* note 42, at 959.

²⁶⁶ See Moe & Howell, *supra* note 40, at 132 (stating that Congress and the courts have institutional reasons for not opposing a presidential expansion of power).

²⁶⁷ Herz, *supra* note 19, at 460.

²⁶⁸ *Id.* at 443.

²⁶⁹ See, e.g., *Constitutional but Unwise?*, *supra* note 139, at 133 ("The opposition party often used the necessity of confirmation as a political weapon to embarrass the President.")

²⁷⁰ *Id.*

what is almost the same thing, to deny authority to the other branches of government."²⁷¹

Although partisanship was present in earlier times, the extreme partisanship of the Congress and the politicization of the judiciary have pushed the institutional balance of power to its breaking point.

[C]ongressional parties have grown more ideologically coherent and partisan as legislative districts have become more homogeneous and primaries have become the dominant means of candidate selection. In recent years, the center has fallen out entirely: in the 1999 Senate, according to a respected analysis of congressional voting, every Democrat had an average score to the left of the most liberal Republican.²⁷²

The dearth of moderate voices willing to place institution above party, even temporarily, has created a predicament in which judicial intervention is necessary. "While both sides are now playing a statistics game to show the other side behaved worse [by not confirming presidential nominees], the reality is that both parties were at fault—each trapped in a cycle of escalating partisanship."²⁷³ This politicization has not been restricted to the Supreme Court.²⁷⁴ "The transformation of the lower court appointment process from one dominated by considerations of senatorial courtesy to one driven by ideological objectives has been well documented"²⁷⁵

Despite the forces that appear to prevent the Senate from acting in its own institutional interests, the Court has been reluctant to intervene in separation of powers questions. It "has essentially left it up to Congress to protect its own institutional interests against presidential aggrandizement."²⁷⁶ If the Senate acted in its institutional interests in the way the executive branch does, perhaps the judiciary

²⁷¹ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2314 (2001).

²⁷² *Id.* at 2311–12 (citing JAMES G. GIMPEL, *FULFILLING THE CONTRACT: THE FIRST 100 DAYS* 13–14 (1996); BARBARA SINCLAIR, *LEGISLATORS, LEADERS, AND LAWMAKING: THE U.S. HOUSE OF REPRESENTATIVES IN THE POSTREFORM ERA* 50 (1995); Richard E. Cohen, *A Congress Divided*, 32 NAT'L J. 382, 382 (2000)); Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 43–51 (1999).

²⁷³ McGinnis & Rappaport, *supra* note 180, at 573; *see also* Hatch, *supra* note 263, at 467 (showing that both democrats and republicans have been accused of blocking judicial nominees).

²⁷⁴ *See* Ruth Marcus, *Booting the Bench*, WASH. POST, Apr. 11, 2005, at A19 (illustrating the ferocious turn that debate over the judiciary has taken). Senator Tom Coburn's Chief of Staff signaled possible approval of "mass impeachment," although he favored an "easier way" to remove judges without the impeachment process: removal by Capitol Police at the end of a term in which a judge has not lived up to the standards of good behavior. *Id.* While speaking to the New York Times, the spokesman for the House Judiciary Committee chairman, F. James Sensenbrenner (R-Wis.), stated that "[t]here does seem to be this misunderstanding out there that our system was created with a completely independent judiciary" *Id.*

²⁷⁵ Yalof, *supra* note 247, at 692 (citing SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997)).

²⁷⁶ Moe & Howell, *supra* note 40, at 171.

would be correct not to involve itself in these difficult separation of powers questions. In the context of recess appointments, however, presidential aggrandizement and senatorial passivity have harmed the Senate as an institution, as well as individual litigants who appear before judges lacking the protections of Article III. Regardless of these harms, the courts have been reluctant to push back against presidential expansion of power.

The tradition of judicial restraint in the separation of powers dates back to the founding era.²⁷⁷ The question before the courts in the context of recess appointments is more than a pure question of the separation of powers. Although recess appointments are an issue within the larger context of institutional power balancing, the core issues regarding recess appointments are in fact constitutional. Approaching the constitutional conflict between Article III and the Recess Appointments Clause as a question of the balance of power between the Senate and President, without consideration of the unconstitutional effects of this laissez-faire response, allows the judiciary to avoid ruling on a constitutional issue that may cut back the power of the presidency.

“[T]he original constitutional design was premised on a set of incentives that would inexorably lead officials to build empires through their branches.”²⁷⁸ This constitutional design that envisioned competition between the branches has failed, at least in part, and has been replaced by political parties—an institution many of the founders hoped to discourage.²⁷⁹ Throughout American history, political parties have linked officeholders to their “state officials and state parties.”²⁸⁰ This reliance upon the party has been exacerbated by changes in the political system, such as the primary system, gerrymandered districts, and the influence of money on politics, that have made political independence more difficult.²⁸¹ With these new incen-

²⁷⁷ See, e.g., THE FEDERALIST NO. 51 (James Madison) (discussing the system of checks and balances between the different branches of the government).

²⁷⁸ Levinson, *supra* note 42, at 958; see also *id.* at 950 (“The trick is to link the self-aggrandizing motives of government officials to the power of their branches. Given ‘the necessary constitutional means and personal motives to resist encroachments,’ Madison argues, the ambitions of the officials who comprise each of the branches will ‘counteract’ one another.” (quoting THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961))).

²⁷⁹ See, e.g., President George Washington, Washington’s Farewell Address (1796), <http://www.yale.edu/lawweb/avalon/washing.htm> (“[T]he common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it.”).

²⁸⁰ See Levinson, *supra* note 42, at 940 (quoting Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 278 (2000)).

²⁸¹ See *supra* note 272 and accompanying text (claiming that political independence is less likely today because of developments in the political system of the United States).

tives, politicians have endeavored to empire-build along party lines rather than through institutional alliances.

Political party affiliation . . . seems to be a much more important variable in predicting the behavior of members of Congress vis-à-vis the President than the fact that these members work in the legislative branch. . . . [B]ranch loyalty . . . seems to be subordinate to their party affiliation or (not unrelated) [to] their constituents' preferences.²⁸²

The failure of the traditional separation of powers balance has been especially acute in judicial appointments. "[R]elative to the stubborn passivity of Congress, it is hard to deny the imperial tendencies of modern presidents. . . . Because individual presidents can consume a much greater share of the power of their institution than individual members of Congress, we should expect them to be willing to invest more in institutional aggrandizement."²⁸³ While these factors are constant in many policy areas, there is an added factor that leads to presidential aggrandizement in the context of judicial appointments. Presidents set their agendas "with an eye toward securing a favorable historical reputation, or 'legacy.'"²⁸⁴ "[T]he federal judges a President chooses may be his most profound legacy."²⁸⁵ Life tenure allows judges identified with a particular President to influence the course of the law for decades to come.

In addition to the unconstitutional nature of recess appointments as they relate to violations of Article III, recess appointments present the prototypical dilemma the separation of powers doctrine endeavors to resolve. "When courts do adjudicate separation of powers cases, they see their primary mission as guarding against the 'encroachment' or 'aggrandizement' of one branch at the expense of the others."²⁸⁶ Despite the myriad constitutional claims against recess appointments, and the parallels between the dangers posed by recess appointments and the institutional weaknesses that separation of powers jurisprudence endeavors to resolve, the courts have failed to intervene.²⁸⁷

²⁸² Levinson, *supra* note 42, at 952–53.

²⁸³ *Id.* at 956.

²⁸⁴ *Id.* (citing Kagan, *supra* note 271, at 2335).

²⁸⁵ Former Senate Majority Leader Robert Dole, Address to the American Society of Newspaper Editors (Apr. 19, 1997), <http://www.freecongress.org/centers/ld/jsmp/index.asp>.

²⁸⁶ Levinson, *supra* note 42, at 951 [FN] (citing *Clinton v. Jones*, 520 U.S. 681, 699–700 (1997); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273 (1991); *Mistretta v. United States*, 488 U.S. 361, 382 (1989); *Morrison v. Olson*, 487 U.S. 654, 693 (1988); *Bowsher v. Synar*, 478 U.S. 714, 727 (1986); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U.L. REV. 1346, 1368 (1994)).

²⁸⁷ See, e.g., *Evans v. Stephens*, 125 S. Ct. 1640 (2005) (denying certiorari and showing the Supreme Court's unwillingness to adjudicate the issue of recess appointments).

There are many explanations for the judiciary's reluctance to fight presidential aggrandizement. It is the President, much more than Congress, who is instrumental in choosing the federal judiciary. This position of power allows the executive to choose nominees who will support presidential power. "[P]residents of all ideological and partisan stripes have a common interest at stake . . . in putting individuals on the Court who will uphold and promote the power of the presidency."²⁸⁸

The Senate does not have a corresponding incentive to favor candidates who are skeptical of presidential power. "[S]enators are primarily oriented by reelection They are only weakly motivated by concerns about the balance of institutional power. . . . For the most part, issues of presidential power are not part of their calculus"²⁸⁹ As a result of this imbalance between presidential and senatorial interest in ensuring judicial candidates who favor their institution, "the best bet, owing largely to the president's control over appointments and to the court system's profound dependence on the executive for the enforcement of its rulings, is that courts will ordinarily be supportive and refrain from imposing serious limits on presidential expansionism."²⁹⁰

Recess appointments compound deference to the power of the presidency. If Moe and Howell are correct and judicial deference to executive power is related to the role played by the President in judicial appointments, then recess appointments will shift the courts toward even greater presidential deference.²⁹¹ If influence on the judicial appointment process is seen as a sliding scale ranging from complete presidential power to complete Senate power, recess appointments lacking Senate input must be seen as the apex of presidential power. At this apex, it should be expected that appointees will be extremely deferential towards executive power when evaluating questions of the separation and balance of power, such as the question of the constitutionality of recess appointments.

The compounding effect of deference to executive power suggested by recess appointments lends support to the urgency with which the courts must act against this unconstitutional practice. By deferring judgment to a later date as the court chose to do in *Evans v. Stephens*,²⁹² the problem will grow more severe as "historical practice"

²⁸⁸ Moe & Howell, *supra* note 40, at 150.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 153.

²⁹¹ *See id.* at 150 ("[Presidents] have the freedom to pick pro-presidential types for the bench [and] . . . they can be expected to behave 'according to type' most of the time. This is enough to tilt the Court in the president's favor.")

²⁹² *Evans*, 124 S. Ct. 1640 (denying certiorari).

and the cascade effect become more forceful.²⁹³ If recess appointees continue to ascend to the federal bench, separation of powers jurisprudence may become even more deferential to presidential power.

In the face of this increasing problem, the judiciary must act to protect the Senate's institutional interests, the judiciary's own interest in remaining independent from executive and legislative oversight, and the interests of individual litigants. Although the Supreme Court and lower federal courts have traditionally allowed the Congress and President to resolve institutional power struggles without intervening, the politicization of the judicial nomination process and the corrupting influence of politics upon the traditional separation of powers calls out for judicial intervention. If the Senate will not protect its own institutional interests (and prevent an unconstitutional and unwise practice), the courts must do so.

CONCLUSION

While the diminished power of the Senate is cause for concern, a more serious threat is the danger recess appointments pose to judicial independence and the guarantees of Article III. By shifting the function of Senate judicial confirmation hearings from an ex-ante evaluation of qualifications to an ex-post review of performance, basic tenets of judicial independence are at risk.

Decisional independence is . . . crucial to maintaining the rule of law, which is premised on the notion that no person nor any group of persons is above the law. What confidence would there be in the judicial branch if a litigant were to bring a matter before a court with the understanding that a decision may be made, not on the basis of facts, law, precedent and logic, but instead on the basis of the external pressures that may be brought to bear by interest groups?²⁹⁴

This threat to judicial independence is not a "threat" in the traditional sense. A traditional threat is a risk that could potentially result in harm. In the case of recess appointments, however, the threat against the independence of the federal judiciary does not represent a hypothetical future ill but one wherein the harm has already occurred. The threat posed by recess appointments to the federal bench is the infringement upon litigants' rights as implied by Article III to have their cases heard before a fair and independent judge. As such, the mere "threat" to the independence of judges represents an unconstitutional practice in and of itself.

²⁹³ See *supra* Part III.C.4. (arguing that a cascade effect problem can develop when one circuit incorrectly rules on an issue and the other circuits follow that reasoning).

²⁹⁴ Vanaskie, *supra* note 128, at 765.

When the President aggrandizes the power of his office and encroaches upon the duties of another branch of government, the Supreme Court has an obligation to act and ensure proper separation of powers. Although supporters of presidential power are correct that recess appointments are a constitutionally created loophole to advice and consent, that loophole does not apply to Article III judges. The guarantees of Article III nullify the President's ability to circumvent the Senate in the case of judicial appointments.

The President may have a valid complaint: the Senate may not have acted as quickly as he hoped in confirming his nominees. If the Senate and the President fail to reach an agreement in which the Senate will act promptly on future nominations, no judicial decision will save the Senate from its failings. As Justice Jackson stated in his *Youngstown* concurrence, "I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems."²⁹⁵

Valid criticisms of Senate inaction, however, do not imply that the courts should abandon constitutional rights. Justice Jackson also stressed that a foundation of our democracy is "that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up."²⁹⁶ In this case the Executive must "be under the law" of the Senate's approval or disapproval of judicial nominations through parliamentary deliberation. It is the duty of the Court to ensure that this constitutional role of the Senate is not usurped.

Recess appointments harm the judicial and legislative branches of the federal government, individual litigants, and our constitutional system. In their zeal to fill the federal bench with philosophically agreeable judges, both political parties have abandoned prudence and constitutional principles. Given the failure of the political system to ensure judicial independence, it is incumbent upon the judiciary to uphold Article III's lifetime tenure and guaranteed compensation provisions by finding recess appointments to the federal bench unconstitutional.

²⁹⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

²⁹⁶ *Id.* at 655.