In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights

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INTRODUCTION

The Recess Appointments Clause in the United States Constitution long has been the source of tense debate between Congress and the executive branch. President George W. Bush's recent recess appointments have given new life to a long-standing controversy surrounding the practice. Following Bush's recess appointments of Charles Pickering and William Pryor to the Federal Court of Appeals in early 2004, Democratic Senator Charles Schumer of New York insisted that Bush's use of recess appointments put "a finger in the eye of the Constitution." Senator Christopher Dodd similarly disagreed with Bush's recess appointment of John Bolton to be U.S. ambassador to the United Nations in August 2005. Dodd stated that "[t]he president should find another nominee who[m] the Senate can support."

In January 2006, Bush's recess appointment of seventeen executive branch officers reinvigorated the controversy between the President and Congress. Both Senator John McCain and Senator Edward Kennedy issued statements critical of the appointments. A New York Times editorial asserted

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1. U.S. Const. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").
that Bush had used this "constitutional gimmick" to "rescue egregiously bad selections" that would never have been confirmed by the Senate.\footnote{Editorial, President Bush at Recess, N.Y. TIMES, Jan. 9, 2006, at A20.}

In December 2006, as United Nations Ambassador Bolton’s recess appointment approached its end, Bush lambasted the Senate Foreign Relations Committee for refusing to send Bolton’s nomination to the Senate floor for a vote. Reluctantly accepting Bolton’s resignation, Bush stated: “They chose to obstruct his confirmation, even though he enjoys majority support in the Senate, and even though their tactics will disrupt our diplomatic work at a sensitive and important time.”\footnote{Helene Cooper, Votes in Doubt, Bolton Resigns as Ambassador, N.Y. TIMES, Dec. 5, 2006, at Al.}

Most recently, during the holiday break in November and December 2007, the Democratic Senate held pro forma sessions to prevent the President from making recess appointments to high level posts that otherwise would have required Senate confirmation.\footnote{Carl Hulse, Democrats Move to Block Bush Appointments, N.Y. TIMES, Nov. 21, 2007, (on file with author); Paul Kane, The Fastest Gavel in the Senate, WASH. POST, Dec. 31, 2007, at A13. The Senate is considered to be in a pro forma session if a member officially “gavels [the session] open and then gavels it closed.” \textit{Id}. No legislation can pass at pro forma sessions, which usually last no more than half a minute. \textit{Id}. As long as such a session is held at least every fourth day, however, the Senate is not considered in recess, and therefore the President cannot make recess appointments to posts that would otherwise require Senate confirmation. \textit{Id}.}

While Democratic Senator Jim Webb of Virginia was “glad to see [that] the leadership stepped up here,” a White House spokeswoman, noting that 190 nominations were pending in the Senate, stated: “Unfortunately, Congress has once again failed to complete important work that will help the American people.”\footnote{Hulse, Democrats Move to Block Bush Appointments, supra note 7.}

President Bush’s extensive use of the Recess Appointments Clause and the controversy surrounding it are not, however, unique to this administration. President Ronald Reagan made 240 recess appointments during his two terms, George H.W. Bush 77 during his one term, William J. Clinton 139 during his two terms, and George W. Bush 167 during his first six years in office.\footnote{Henry B. Hogue, Congressional Research Service, Recess Appointments: Frequently Asked Questions, CRS Report RS21308, at CRS-2 (Sept. 10, 2002).}

Since World War II, Presidents Harry Truman and Dwight Eisenhower have made the most recess appointments, behind Reagan: 195 and 193, respectively.\footnote{Michael A. Carrier, When is the Senate in Recess for Purposes of the Recess Appointments Clause, 92 MICH. L. REV. 2204, 2212-13 n.48 (1993-1994).}

Although the vast majority of recess appointments have filled executive branch positions, presidents have issued recess appointments for over 300 judges to U.S. district courts, appeals courts, and the Supreme Court since our nation’s founding.\footnote{Louis Fisher, Congressional Research Service, Federal Recess Judges, CRS Report RS22039, at CRS-1 (Feb. 2, 2005) [hereinafter Fisher, Federal Recess Judges].}

Both sides of the congressional aisle have long articulated their discontent
with this practice. In fact, Members of Congress from both parties have accused the President of abusing his power by using the Recess Appointments Clause, despite its considerable use by both Democratic and Republican Presidents. President George Washington’s recess appointment of John Rutledge to Chief Justice of the Supreme Court in 1795 was met with resistance by the Senate, which shortly thereafter rejected Rutledge’s nomination. More recently, two of President Clinton’s recess appointments encountered Senate hostility. Clinton’s recess appointment of James C. Hormel to be ambassador to Luxembourg in June 1999 led Republican Senator James Inhofe to announce that Clinton treated the Senate confirmation process “as little more than a nuisance which he can circumvent whenever he wants to impose his will on the country.” Similarly, Clinton’s recess appointment of Roger Gregory to the Fourth Circuit Court of Appeals in December 2000 inspired Senator Inhofe to object that the recess appointment was “an abuse of power” and an “outrageously inappropriate . . . effort to bypass the Senate.”

At first glance, the Recess Appointments Clause (“the Clause”) appears straightforward: “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.” The Clause was created as an exception to the Appointments Clause immediately preceding it, which required that the President obtain the advice and consent of the Senate to appoint officers. As Michael Herz has written, the Clause “occupies an

13. Id. at CRS-12.
15. U.S. CONST. art. II, § 2, cl. 3 (emphasis added to denote the three constitutional issues discussed infra notes 28, 30, and 31).
16. U.S. CONST. art. II, § 2, cl. 2 states that “[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”
17. In The Federalist No. 67, Alexander Hamilton provided the authoritative explanation of the Recess Appointments Clause’s purpose, based upon the pragmatic need to fill government positions without undue delay:

The relation in which [the recess appointments] clause stands to the [previous clause], which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other, for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. The ordinary power of appointment is confined to the President and Senate jointly, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, singly, to make temporary appointments “during the recess of the Senate, by granting commissions which shall expire at the end of their
interesting niche in constitutional law." It does not possess the "importance and vagueness" of other hotly contested constitutional clauses, such as the Due Process Clause; however, "it does not suffer from the irrelevance or the precision that have doomed the title of nobility prohibitions or the requirement that the president be thirty-five years old to the Siberia of constitutional discourse." The Clause remains relevant because of the unique interpretive issues that its text presents. Furthermore, interpretation of the Clause does not divide along party lines. It has been used extensively by both Democratic and Republican Presidents and been the basis of extensive criticism by both Democratic and Republican Members of Congress. An interpreter of the Clause is therefore "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." These unique characteristics, along with President George W. Bush's controversial appointments, likely account for the recent growth in interest in the Clause among legal scholars. While Michael A. Carrier published the only extensive academic article about the Clause in the 1990s, during the last three years William Ty Mayton, Michael Rappaport, Edward Hartnett, and Michael Herz have each investigated the constitutionality of the current recess appointments practice. These scholars rely largely upon arguments from constitutional text, purpose, structure, and history to support their positions. Generally, Rappaport, Carrier, and Mayton focus on text and structure to support a formalist interpretation of the Clause, limiting the President's recess appointment power. In contrast, Hartnett and Herz focus on purpose and history to support a functionalist interpretation, justifying the President's broad recess appointment power.
These five scholars have focused the controversy primarily around three constitutional issues concerning the text of the Clause. First, they have disagreed about whether the word "happen" in the Clause means "happen to arise," allowing the President to fill only vacancies that arose during a Senate recess, or "happen to exist," enabling the President to fill vacancies that arose while the Senate was in session but still existed after a Senate recess began. Second, they have debated the definition of "recess": whether the President's appointment power applies only to intersession recesses or also to brief intrasession recesses. Finally, they have analyzed whether the Recess place determinate, readily enforceable limits on public actors" or "might be understood as deduction from authoritative constitutional text, structure, original intent, or all three working together." Formalist reasoning "promises stability and continuity of analysis over time." In contrast, functionalism "might be associated with standards or balancing tests that seek to provide public actors with greater flexibility" or "might be understood as induction from constitutional policy and practice, with practice typically being examined over time." Functionalist reasoning "promises adaptability and evolution." William N. Eskridge, Jr., Relationships Between Formalism and Functionalism in Separation of Powers Cases, 22 HARV. J.L. & PUB. POL'Y 21, 21 (1998-99).

28. The Clause empowers the president to fill vacancies "that may happen during the recess of the Senate." U.S. CONST. art. II, § 2, cl. 3 (emphasis added). Michael Rappaport devoted much of his article to arguing that "happen" should be read as "happen to arise." See Rappaport, supra note 23, at 1493-1509. Such a reading would allow the President to fill only those vacancies that first arose during a Senate recess. In response, Edward Hartnett and Michael Herz have argued that the Clause's purpose and historical practice dictate that "happen" must continue to be read as "happen to exist," enabling the President to fill a vacancy that arose while the Senate was in session but still exists during a subsequent recess. See Hartnett, supra note 24, at 384-407; Herz, supra note 18, at 445-46. This debate is of particular significance because many recess appointments fill vacancies that arose while the Senate was in session, including President Bush's seventeen recess appointments in January 2006. Accordingly, Rappaport's "happen to arise" interpretation would more drastically limit the President's recess appointment power than would the "happen to exist" interpretation.

29. There is typically only one intersession recess per year (assuming that the President does not call an "extraordinary session") that usually lasts from mid-October through early January. In contrast, there are typically six or seven intrasession recesses per year, ranging from a few days to one month or more in length. See Rappaport, supra note 23, at 1501; United States Senate, Tentative 2007 Legislative Schedule, available at http://www.senate.gov/pagelayout/legislative/two_column_table/2007_Schedule.htm.

30. Just as with the interpretation of "happen," the answer to this question has a significant impact on the President's recess appointment power. If "recess" were read only to include intersession recesses, the President generally would be limited to only one recess per year in which to make recess appointments. See Rappaport, supra note 23, at 1501. In contrast, if intrasession recesses are included—as is the current practice—the President has six or seven more recesses of a few days to one month or more to take advantage of the Recess Appointments Clause. See id. Furthermore, recess appointments made during intrasession recesses can be significantly longer than those made within the intersession recess. Recess appointments "expire at the End of the [Senate's] next Session." Id. Recess appointments made during an intersession recess are always one year long because the Senate's "next Session" has not yet begun. By contrast, recess appointments made during intrasession recesses can be up to almost two years long because the appointee is entitled to hold his position for the remainder of the current session and the entirety of the "next" full Senate session. See id. at 1567-68. Rappaport asserts that the Clause must be read to limit the President to intersession recesses. See id. at 1547-62. Michael Carrier also supports this view. See Carrier, supra note 10, at 2218-27. Hartnett, on the other hand,
Appointments Clause’s “all vacancies” language was meant to include Article III federal judges; and if so, whether recess appointments of judges are unconstitutional because of a separation of powers conflict with Article III.  

In analyzing these three questions, these scholars have focused largely on answering the question: how should the Recess Appointments Clause properly be interpreted? Of significantly less interest to them is why each of these questions has in practice long been moot. Presidents have long exercised broad power to fill effectively all vacancies regardless of when they occurred, what type of recess existed, or whether those vacancies were executive or judicial in nature. The reason for the executive branch’s sweeping interpretation of the Clause is probably self-evident. Yet an equally important and previously unexplored question remains: why have the legislative and judicial branches long accepted the constitutionality of such a controversial practice?

This paper answers this functional question in three Parts. Part I argues that despite the House of Representatives’ and the Senate’s complaints, the legislative branch has concluded that challenging the President’s broad recess appointment power in the political, rather than the constitutional, arena promises more success—such that Congress has more to gain by invoking its enumerated legislative powers than by making constitutional claims about the Clause. Part II argues that the judicial branch has justifiably relied on the longstanding executive recess appointment practice and legislative acquiescence to hold broad recess appointment power constitutional. Accordingly, the judiciary has refused to set limits on a discretionary practice whose controversies have been effectively resolved through political debate and compromise.

Finally, Part III demonstrates that the broad recess appointment power that the three branches have agreed to is functionally superior to a narrow construction. It does so by examining arguably the two most bitter recess

reads the Clause to include all recesses, whether intersession or intrasession. See Hartnett, supra note 24, at 411-16, 419-20, 426.

31. The controversy resides in the apparent separation of powers conflict between Article II, section 2, clause 3’s provision that the “President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate and Article III, section 1’s provisions that federal judges should enjoy life-tenure and salary protection: “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.” U.S. CONST. art. III, § 1 (emphasis added). Because recess appointed Article III judges do not enjoy life-tenure and salary protection, there is the fear that they will not be sufficiently independent from the executive branch. Scholars such as William Ty Mayton have argued that recess appointing Article III judges violates the life-tenure status and salary protection required by Article III. See Mayton, supra note 22, at 522-31. In contrast, Hartnett maintains that no constitutional conflict exists between the two clauses. See Hartnett, supra note 24, at 427-40. Finally, Herz concedes a separation of powers conflict, but finds that the text and history of the Recess Appointments Clause provide sufficient support for the practice of Article III recess appointments to outweigh the opposing arguments from purpose and structure. See Herz, supra note 18, at 448-50.
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appointment battles of recent years: President Clinton’s appointment of Bill Lann Lee to Assistant Attorney General for Civil Rights in 1997 and President Bush’s recess appointment of Charles Pickering to the Fifth Circuit Federal Court of Appeals in 2004. Both of these appointment battles support this paper’s conclusion that broad presidential recess appointment power is not only constitutionally sound, but also provides for a more effective functioning of government than a narrow recess appointment power would offer.

I

THE LEGISLATIVE BRANCH: CONSTITUTIONAL ACQUIESCENCE AND POLITICAL OPPOSITION

Although certain scholars have argued that the legislative branch has rejected a notion of broad executive recess appointment power,32 this paper asserts that the legislative branch has long acquiesced as to the constitutionality of this practice. U.S. Attorney General opinions nearly a century apart accurately describe the legislative branch’s stance. In 1862, Attorney General Bates informed President Lincoln that the President’s constitutional power to make recess appointments for vacancies that happened during a Senate session had been “sanctioned . . . by the unbroken acquiescence of the Senate.”33 In 1960, Attorney General Walsh assured President Eisenhower that “[i]n view of this congressional acquiescence, you have, without any doubt, the constitutional power to make recess appointments to fill any vacancies which existed while the Senate was in session.”34 Walsh stated further that the President’s power to make a recess appointment during an intrasession recess of one month was “amply supported by . . . legislative authority.”35

Unsurprisingly, the executive branch has long asserted the constitutionality of broad recess appointment power. Since Attorney General William Wirt’s 1823 opinion, attorneys general have unanimously supported the “happen to exist” (or, simply, the “exist”) interpretation.36 Similarly, since

32. See, e.g., Chanen, supra note 26, at 200-02; Carrier, supra note 10, at 2229-32; Mayton, supra note 22, at 533-34.
35. Id. at 467.
Attorney General Harry M. Daugherty’s opinion in 1921, attorneys general have supported recess appointments made during intrasession recesses as short as ten days in length.\(^{37}\) Attorneys general have provided three primary justifications for the broad presidential powers that the “exist” interpretation confers. First, attorneys general have advised that the purpose of the Clause—to ensure that the President can expeditiously fill federal vacancies to promote effective government—dictates the “exist” interpretation.\(^{38}\) Second, they have argued that because the executive branch continues to implement the nation’s laws while the other branches are in recess, broad recess appointment powers are necessary and justified.\(^{39}\) Finally, attorneys general have emphasized that there are structural checks to ensure that the President does not abuse his power by invoking the Clause: the temporary nature of recess appointments, the President’s integrity, and the Senate’s ability to check presidential power.\(^{40}\)

Similarly, attorneys general have justified the constitutionality of intrasession recess appointments by emphasizing the practical purpose behind the Clause.\(^{41}\) Although individual members of the legislative branch have criticized these justifications for a broad presidential recess appointment power, neither the Senate nor Congress as a whole has formally challenged the constitutionality of this power. This Part will demonstrate that since 1813, through legislation, Senate committee reports, and Senate resolutions, the legislative branch has acquiesced in the constitutionality of the executive’s

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\(^{37}\) Until 1901, attorneys general advised the President on only one recess appointment issue: whether he could make a recess appointment for a vacancy that arose during a Senate session. In 1901, Attorney General Philander C. Knox first examined the constitutionality of intrasession recess appointments, determining that a President could not make a recess appointment during intrasession recesses, 23 Op. Att’y Gen. 599, 604 (1901). In 1921, however, Attorney General Daugherty supported the constitutionality of a recess appointment during an intrasession recess of 28 days, 33 Op. Att’y Gen. 20, 24-25 (1921). More recently, President Reagan made recess appointments during an intrasession break of 13 days, President George H.W. Bush during a 17 day intrasession recess, President Clinton during 11 and 9 day intrasession recesses, and President George W. Bush during a 10 day intrasession recess. See Halstead, supra note 36, at CRS-9 to CRS-10. Notably, attorneys general have not advised the President as to whether recess appointing Article III judges is constitutional. This is presumably because this power was not questioned until Professor Henry Hart’s 1953 objection that it would “violate the spirit of the Constitution, and possibly also its letter,” Hartnett, supra note 24, at 433, and soon thereafter this power was held constitutional by the Second Circuit Court of Appeals in United States v. Allocco, 305 F.2d 704 (2d Cir. 1962).


\(^{39}\) In contrast to the legislative and judicial branches—which both enjoy recesses from their duties—the executive branch is always in session. See, e.g., 2 Op. Att’y Gen. at 526; 3 Op. Att’y Gen. at 675-76; 12 Op. Att’y Gen. at 35-38, 41-42.


broad interpretation of the recess appointment power. This does not, however, mean that the legislative branch has acquiesced to every specific use of this power. On the contrary, the legislative branch has demonstrated that opposing the President politically—in particular through its appropriations power and its advice and consent power—is the more effective method of limiting executive recess appointment power. Furthermore, this Part will demonstrate that which political party controls the executive and legislative branches has little impact on the balance of appointment power between those branches when the minority party in the Senate has the forty-one votes necessary to exercise a filibuster.

A. Accepting the Constitutionality of the President’s Broad Recess Appointment Power

1. Congressional Acceptance of the “Exist” Interpretation

Although the legislative branch has opposed the “exist” interpretation, it long has chosen to limit rather than attempt to abolish presidential recess appointment power to fill vacancies that arose during a Senate session. In 1863 and 1940, Congress took definitive steps to limit the President’s power...
through legislation. Rather than mounting a constitutional challenge, they instead applied the powers unique to their branch—their appropriations power and advice and consent power—to discourage the President from making recess appointments under the "exist" interpretation. This kind of collateral opposition was an implicit acquiescence to the constitutionality of the practice.

Congressional history demonstrates that attacks on the "exist" interpretation have not been constitutional in nature. Following the many attorney general opinions between 1823 and 1862 supporting the "exist" interpretation, the Senate and the Congress took steps in 1863 to limit the President's recess appointment power by enforcing their appropriations power. The Senate directed its Judiciary Committee to consider whether the "exist" interpretation was in accord with the Constitution, and if not, "what remedy shall be applied." The Senate Judiciary Committee issued a report stating that Attorney General Wirt's support for the "exist" interpretation was "a perversion of language." According to the report, Wirt's reasoning prioritized the importance of filling vacancies over the Senate's constitutional advice and consent role. The Committee asserted that unless the President's recess appointment power was limited, "an ambitious, corrupt, or tyrannical executive" could destroy the Senate's constitutional function. Republican Senator William Fessenden echoed the Committee's remarks as he, along with the rest of the Senate, considered constraining Republican President Lincoln's power through legislation. Fessenden stated in 1863: "It may not be in our power to prevent the [recess] appointment, but it is in our power to prevent the payment; and when payment is prevented, I think that will probably put an end to the habit of making such appointments." In this way, the Senator countered the "exist" interpretation without mounting a constitutional attack.

Shortly following Fessenden's statement, a Republican-controlled Congress passed the Army Appropriations Act of 1863, which prohibited payment of money from the Treasury "as salary, to any person appointed

original). In 1822, the Senate similarly held that the President could not create an office, and then make appointments to that office during the recess without the consent of the Senate. Id. These instances demonstrate the Senate's opposition to what it considered an abuse of executive authority. In contrast to what Professor Chanen has argued, however, the Senate was not broadly asserting opposition to the "exist" interpretation. See Chanen, supra note 26, at 201. The Senate's criticism was much narrower. It specifically condemned recess appointments for new offices created by the President, "which have not as yet been filled," because without ever having originally been filled, a vacancy could not exist. By "vacancies," the Senate understood vacancies as "occurring from death, resignation, promotion, or removal"; none of these casualties existed in the 1813 and 1822 cases. See Story, supra. Accordingly, although the Senate demonstrated opposition to the President's recess appointment powers, in neither of these instances was it directly questioning the constitutionality of the "exist" interpretation.

47. S. REP. No. 37-80, at 1 (1863).
48. Id. at 5.
49. Id. at 6.
50. CONG. GLOBE, 37th Cong., 3rd Sess. 565 (1862).
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." Under this statute, an officer who
was recess appointed to fill a vacancy that arose while the Senate was in
session would not be paid for his services, until the Senate eventually
consented to his nomination or Congress passed a special appropriation.

Even more direct criticism in 1937 by Senators Burke and Vandenberg
did not ultimately convince the Senate to challenge the constitutionality of the
President’s broad recess appointment power. This debate began after
Democratic President Franklin Roosevelt threatened to wait until the Senate
recess so that he could unilaterally fill a Supreme Court vacancy that occurred
during a Senate session. Democratic Senator Burke stated angrily that the
“exist” interpretation was not founded in constitutional authority: “If there is a
vacancy on the Supreme Court . . . and it did not happen during a recess of the
Senate, where would the President get any authority to make an appointment to
fill the vacancy? I do not understand where the authority comes from at all.”

51. 12 Stat. 646 (1863). Opposite Republican President Lincoln, a Republican-controlled
Senate and House of Representatives passed this statute limiting payment of recess appointees
who filled vacancies that did not arise during a Senate recess. See United States Senate, Party
Division in the Senate, 1789 – Present, http://www.senate.gov/pagelayout/history/
one_item_and_teasers/partydiv.htm (last visited June 23, 2007) [hereinafter Party Division in the
Senate]; United States House of Representatives, Historical Information: Congress Overview,
demonstrates that Senators, regardless of party, were concerned about broad presidential recess
appointment power.

52. Fisher, Recess Appointments, supra note 12, at CRS-5. Fisher describes an example of
this practice: the case of George Rublee, who was nominated to the Federal Trade Commission in
March 1915. Rublee received a recess appointment, only to have his nomination later rejected by
the Senate. He continued to serve the rest of his recess appointment until September 1916, and
was thus denied payment under the 1863 statute. Congress, however, passed a special
appropriation to pay Rublee’s salary for the fourteen months between the start of his service and
his rejection by the Senate. Id. at CRS-6.

53. Mayton, supra note 22, at 545-46. It is also worth noting that in 1867, a Republican-
controlled Congress passed the Tenure of Office Act, which contained further restrictions on
Republican President Grant’s appointment and removal powers. In particular, Section 3 of the Act
stated that the President could use recess appointments only to fill vacancies created by death or
resignation. See 14 Stat. 431 (1867). If the President did not fill the vacancy with a recess
appointment during that recess, or if the Senate rejected the recess appointee’s nomination in its
next session, the office was to “remain in abeyance, without any salary, fees, or emoluments
attached thereto, until the same shall be filled by appointment thereto, by and with the advice and
consent of the Senate.” Id. Although Congress ultimately repealed the Act entirely in 1887 (after
President Andrew Johnson was impeached in part for ignoring the Tenure of Office Act by
removing Secretary of War Edwin Stanton from office, (see Halstead, supra note 36, at CRS-14)),
and the Supreme Court struck down similar limits to the President’s removal powers in Myers v.
United States, 272 U.S. 52 (1926), the Act nonetheless demonstrated Congress’s statutory efforts
to discourage recess appointments by flexing its appropriations muscle.

54. 81 CONG. REC. 7996 (1937).
Republican Senator Vandenberg proposed a "Sense of the Senate" resolution, asserting "that an appointment to the Supreme Court should be made only at such a time as the Senate may act upon confirmation prior to the entry of the nominee upon his service." A few Senators reminded others that under the Army Appropriations Act of 1863, Congress could deny the appointee payment. Because President Roosevelt did not act on his threat, nothing came of the resolution.

To the contrary, despite the Senate's extensive and bipartisan criticism of President Roosevelt's recess appointment power, a Democrat-controlled Congress ultimately amended the 1863 statute in 1940 to make it less burdensome on presidential recess appointees. The 1940 amended act, codified at 5 U.S.C. § 5503, maintained the general rule from the 1863 statute in § 5503(a):

Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate.

However, the new act provided three exceptions to this section. A recess appointee would not be denied payment if: (1) "the vacancy arose within 30 days" before the end of the Senate session; (2) "a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending" before the recess; or (3) "a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected" received a recess appointment. Furthermore, § 5503(b) requires that a

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55. Carrier explains that a "sense-of-the-Senate resolution is technically a 'Senate simple resolution.' The influence of Senate simple resolutions is 'restricted to the scope of authority of the Senate acting as a single body of Congress, and [such resolutions] are used for such purposes as expressing the sense of the Senate on a matter.'" See Carrier, supra note 10, at 2231 n.141 (citing FLOYD RIDDICK, SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. Doc. No. 2, 97th Cong, 1st Sess. 975 (1981)).
56. 81 CONG. REC. 7963 (1937).
57. See 81 CONG. REC. 8103 (1937).
58. It is worthy of note that Senators of both parties criticized Roosevelt's recess appointment proposal, particularly considering that in 1937, three-quarters of the Senate were Democrats. See Party Division in the Senate, supra note 51. This fact demonstrates that the presidential recess appointment power issue arguably transcends traditional partisan lines and philosophies.
59. Fisher, Recess Appointments, supra note 12, at CRS-6. Just as in 1937, the Democrats controlled both the Senate and the House of Representatives in 1940. Equally important, the Senate was 69-23 Democrat / Republican, preventing Republican Senators alone from attaining the 41 votes necessary to successfully filibuster this 1940 amendment (if they so desired). See Party Division in the Senate, supra note 51.
nomination to fill a vacancy falling under any of these three exceptions shall be submitted to the Senate no later than forty days after the beginning of the Senate's next session. These provisions had the effect of broadening the presidential power to appoint officials via the Clause because they helped increase the number of contexts in which recess appointees would be paid for their service.

The Army Appropriations Act of 1863 and 5 U.S.C. § 5503 both demonstrate that instead of challenging the constitutionality of the President's broad recess appointment powers under the "exist" interpretation, the Senate and Congress have indirectly accepted it. Although the 1863 statute attempted to deter the President from taking advantage of the "exist" interpretation, it served as a sign of implicit acquiescence to the President's right to make such appointments. Furthermore, it demonstrated the legislative branch's decision that using its appropriation power to exert influence on the President is likely more effective than a direct constitutional challenge. The 1940 amendment even more clearly illustrated legislative acquiescence, as Congress may well have realized that for the greater benefit of the appointments process, certain exceptions should be made—and Congress did so despite individual Senators' contentions that the "exist" interpretation was constitutionally improper.

2. Congressional Acceptance of the "All Recesses" Interpretation

The Republican-controlled Senate Judiciary Committee issued a report in 1905 with the intention of clarifying the definition of "recess" in the Recess Appointments Clause. On its face, the report's language accepts the "all recesses" interpretation. The report defined "recess" as "the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive

61. Id. § 5503(b). A House Report accompanying the Act stated that the exceptions were created "to render the existing prohibition on the payment of salaries more flexible." H. Rep. No. 76-2646, at 1 (1940). The report explained further that "[f]rom a practical standpoint it frequently creates difficulties especially in those cases in which a vacancy arose shortly before the close of a congressional session, leaving insufficient time to fill a vacancy by nomination and confirmation. Difficulties also arise in cases in which a session terminates before the Senate acts on pending nominations, as has at times happened." Id. In addition to § 5503, all Treasury and General Governmental Appropriations Acts for at least the last fifty years provide an annual funding limitation prohibiting the payment of any recess appointee whose nomination has been voted down by the Senate prior to the recess. Because, as a practical matter, nominations are rarely rejected by a vote of the full Senate, these provisions are rarely enforced. See Hogue, supra note 9, at CRS-5.

62. One could argue that the Democrat-controlled Congress was supporting Democratic President Roosevelt with the 1940 amendment, particularly because Republican Senators would alone have been unable to filibuster with only twenty-three votes. See supra note 59 and accompanying text. However, it is important to remember the inherently non-partisan element of recess appointment power: Democratic Senators must have realized that such legislation would benefit future Republican presidents as well.
Carrier argues that the report should not be used to represent the Senate's position regarding recess appointments during intrasession recesses. By 1905, there had only been one documented intrasession recess appointment, and thus, according to Carrier, the intersession-intrasession issue was not on the Senate's mind. Nonetheless, Attorney General Daugherty cited the Senate's report directly in 1921 when he held that recess appointments made during intrasession recesses were constitutional. Moreover, the Senate has made no attempt since, through legislation or litigation, to establish intrasession recess appointments unconstitutional. In this way Congress has acquiesced in the constitutionality of the "all recesses" interpretation, forgoing the opportunity of directly challenging the broad recess appointment power.

3. Congressional Acceptance of Recess Appointments for Article III Judges

In 1960, the Democrat-controlled Senate adopted a resolution discouraging Presidents from using the Clause to appoint Justices to the U.S. Supreme Court. Concerned about Republican President Eisenhower's recess appointments of Earl Warren, William Brennan, and Potter Stewart to the Court in 1953, 1956, and 1958, respectively, Democratic Senator Philip Hart introduced Senate Resolution 334. Senator Hart worried about the separation-of-powers conflicts such appointments created between the President and the Senate, as well as between Article II and Article III more generally. 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 interest of the Supreme Court, the nominee who may be involved, the litigants before the Court, nor indeed the people of the United States." It advised the President "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.

Despite Hart's urgings, he clearly accepted the constitutionality of recess appointments to the Supreme Court, stating that "[i]f there ever was ground for

63. S. REP. NO. 58-4389, at 2 (1905) (emphasis omitted), reprinted in 39 CONG. REC. 3823 (1905). The report found that "recess" was a term of "ordinary, not technical, signification," and should be interpreted "as the mass of mankind then understood it and now understand it." Id. at 1-2.
64. Carrier, supra note 10, at 2230.
65. Id. According to Carrier, the committee report instead addressed only President Theodore Roosevelt's abuse of "constructive recesses" between the end of a special session of the Senate and the immediate commencement thereafter of a regular session of the Senate. Id. at 2229-30.
67. See Halstead, supra note 36, at CRS-17.
68. See supra note 31 for further explanation of the separation-of-powers issues.
69. 106 CONG. REC. 18130 (1960).
70. Id.
the argument . . . time has answered it . . . [t]he President does have such power and this resolution does not argue otherwise.” Hart’s resolution demonstrates again that while the Senate was willing to acquiesce as to the constitutionality of broad recess appointment power, it was intent on using its rhetorical and constitutional powers politically to oppose executive abuse.

B. Making Sense of Congress’s Reaction to the President’s Broad Recess Appointment Power

Why has the legislative branch chosen to oppose the President’s broad recess appointment powers through political means rather than through litigation or legislation directly attacking the constitutionality of the practice? There are several potential answers to this question. First, the Senate likely lacks standing to bring a suit directly challenging a recess appointee’s commission. Second, congressional legislation prohibiting payment to certain recess appointees could itself be held unconstitutional if the Senate were to press the matter through litigation or legislation. Finally, and probably most significant, the executive’s discretionary authority under the Recess Appointments Clause may well be a matter best settled through political debate and agreement between the Senate and the President. This section will address each of these potential explanations in turn.

1. The Senate’s Inability to Oppose Recess Appointments Through Litigation

It is unlikely that Senators have standing to bring suit against a recess appointee whom they believe was unconstitutionally appointed. As the Supreme Court explained in Allen v. Wright, “the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” The “core component” of standing, “derived directly from the Constitution,” is that “[a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” Although no Senator has tested the standing doctrine in challenging recess appointments, it seems unlikely that he or she could claim personal injury from a presidential recess appointment.

In Raines v. Byrd, the Supreme Court held that Members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act, which authorized the President to cancel certain spending and tax benefit

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71. Id.
73. Id. at 751. "Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.” Id.
measures after signing them into law. The Court stressed that standing depends on "personal injury" and that "our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." The Court determined that the plaintiffs based their claim of standing on "a loss of political power," a "type of institutional injury" that fell short of the "personal injury" requirement under Article I. The Court emphasized that the Members of Congress did "not claim that they have been deprived of something to which they personally are entitled—such as their seats as Members of Congress after their constituents had elected them." Similarly, any suit by Members of Congress challenging the President's recess appointment power would likely also fail on standing grounds.

Examining the Senate's power to challenge "temporary appointments" demonstrates further why Senators would likely fail to fulfill the standing requirements. In the case of "temporary appointments"—statutorily created by the Vacancies Act as an alternative to the Recess Appointments Clause—there are two paths for directly challenging a presidential appointment. The Justice Department can challenge a temporary appointee on a writ of quo warranto or the Senate can claim the deprivation of its constitutional right to confirm presidential appointments. As Professor Lois Reznick explains, convincing the attorney general to bring a writ of quo warranto challenging a temporary appointment would be difficult "because a member of the executive branch is unlikely to bring an action that can only embarrass the President." As to the second option, Senators do seem to have standing to challenge a temporary appointment by the President where the appointee has not been originally confirmed by the Senate. In such a case, because the temporary

75. Id. at 819-20.
76. Id. at 821.
77. Id. (emphasis in original).

The Vacancies Act is a general congressional provision for succession at the top of the executive and military departments and the bureaus within those departments. When such a vacancy occurs, the first assistant, who must have been confirmed by the Senate in all of the departments covered by the Act, is automatically authorized to perform the head officer's duties until a permanent successor is named. The President also has the option of naming an officer of another department or bureau, whose permanent appointment has been confirmed by the Senate, to fill the vacancy.

79. Reznick, supra note 78, at 155.
80. Under the common law, a writ of quo warranto commanded a government official to show by what authority he supported his claim to office. See Chanen, supra note 26, at 201 n.67.
81. Reznick, supra note 78, at 157. Professor Chanen agrees that convincing the attorney general to bring a writ of quo warranto to challenge a recess appointment is unlikely. Chanen, supra note 26, at 201 n.67.
appointment explicitly violates the statutory provision, the Senate is clearly deprived of its constitutional right to provide advice and consent to appointments.

In the case of recess appointments, however, it seems that neither of these options for challenging presidential recess appointments exists. To establish standing, Senators would have to prove first that the President's broad recess appointment power was unconstitutional. Only then could the Senate establish that the unilateral appointment should have been submitted to the Senate for confirmation, and thus that its advice and consent power has been abridged. Because the judicial branch—as described in Part II below—has long found broad presidential recess appointment power constitutional, it is unlikely that Senators could ever establish standing to bring suit challenging a recess appointment.

2. The Possibility That 5 U.S.C. § 5503 Might Be Held Unconstitutional

Congress likely chose to limit appointee compensation through 5 U.S.C. § 5503 because it is a more risk-averse means to oppose broad presidential recess appointment power than is attempting to outlaw this broad power completely. Legislation outlawing broad recess appointment power\(^\text{83}\) might inspire litigation directly addressing the constitutionality of the President's current recess appointment practice.\(^\text{84}\) In such a case, if the courts were to hold in favor of Congress, Congress would attain its goal. However, if the courts were to hold against Congress, the constitutionality of § 5503 would likely become a central issue. As a federal district court noted in Staebler v. Carter, "if any and all restrictions on the President's recess appointment power, however limited, are prohibited by the Constitution, 5 U.S.C. § 5503 . . . might also be invalid."\(^\text{85}\) Accordingly, an attempt to prohibit the President's recess appointments practice through legislation could backfire with a judicial invalidation of § 5503, thereby denying the legislative branch its only viable restriction on the presidential recess appointment power.

It is equally telling that the executive branch has never questioned the constitutionality of the § 5503 restrictions.\(^\text{86}\) Considering that courts have held

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83. I.e., the power to make recess appointments (1) for vacancies that occurred prior to Senate recess, (2) during an intrasession recess, or (3) for an Article III vacancy.

84. It turns out that these three major issues have been litigated and that courts have held in favor of the executive branch—a matter discussed in Part II. However, this litigation was not initiated by a congressional constitutional challenge. Thus, the constitutionality of 5 U.S.C. § 5503 has never been adjudicated, and Congress is still able to wield its appropriations power to discourage the President from using his broad recess appointment powers.

85. Staebler v. Carter, 464 F. Supp. 585, 596 n.24 (D.D.C. 1979). See also Rappaport, supra note 23, at 1544 (stating that "[i]f we assume that the exist interpretation is the correct view of the Constitution, the statute is unconstitutional because it uses Congress's appropriations power to infringe on the President's recess appointment authority").

the President’s broad recess appointment power constitutional, it might seem surprising that the executive branch has not challenged congressional limits placed on its constitutional power. As Professor Rappaport reports, the executive branch’s Office of Legal Counsel has held that a use of congressional appropriation power could be unconstitutional if it infringes on executive functions authorized by the Constitution.

Why then has the executive branch not argued that § 5503 is unconstitutional? Perhaps because pitting the executive branch’s Article II recess appointment power against Congress’s Article I appropriations power could reinvigorate a controversy that ultimately has been settled in favor of the executive branch. Rappaport explains: “My strong suspicion is that the executive branch realizes that an attack on the statute would expose the weaknesses of the exist interpretation. Therefore, the executive acquiesces in the statute, knowing it is better off with the exist interpretation and the statute than it would be under the arise interpretation alone.” Like Congress, though for different reasons, the executive branch would rather see the recess appointment controversy addressed in the political arena than in the courts.


Recognizing the limited effectiveness of litigation and legislation seeking to abolish the President’s broad recess appointment power, the legislative branch apparently has concluded that confronting the executive branch politically is a more effective way to constrain presidential recess appointment decisions. This conclusion has in many instances proven correct. In 1960, 1985, 1999, 2004, and 2006, the Senate’s political pressure on the President ultimately led to political agreement between the two branches. Each of these instances demonstrates that although the Recess Appointments Clause may cause repeated conflict among the branches, these struggles are best resolved through the political process.

Presidents of the applicability of the pay restriction statutes without raising constitutional concerns.”).  
87. See infra Part II.  
88. Rappaport, supra note 23, at 1544 n.176. The Office of Legal Counsel stated: “Congress could not deprive the President of this power by purporting to deny him the minimum obligational authority sufficient to carry this power into effect.” 5 Op. Off. Legal Counsel 1, 5-6 (1981).  
89. Rappaport, supra note 23, at 1545 n.177.  
90. In pursuing this path, the Senate and the President have adhered to the famous guidance given by James Madison in The Federalist No. 51. Madison preached a balance of power among the branches supplied not by rigid division, but “by so contriving the interior structure of government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.” The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961). Madison emphasized that the potential abuse of power by one branch should rarely be prevented by direct prohibition. Instead, the counterbalancing power of the other branches would provide adequate protection: “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each
In 1960, Democratic Senator Philip Hart’s Senate proposal discouraging the President from issuing recess appointments to Supreme Court justices—discussed supra in Part I.A.3—led to passionate debate on the Senate floor. While the supporters of the resolution agreed that issuing recess appointments to federal judges conflicted with both the Senate’s advice and consent role and Article III’s life-tenure requirement, opponents argued that it would “transfer [] to the Senate a power which the Constitution gave to the Presidency.”91 The Democrat-controlled Senate ultimately passed the resolution, with voting largely taking place along party lines: the Democrats supported it 48 to 4 while the Republicans opposed it 33 to 0.92 Although the resolution was far from unanimous, it apparently had a significant effect on the executive branch: there has not been a recess appointment to the Supreme Court since the enactment of the resolution, and there has been a sharp decrease in the number of judicial recess appointments generally. While there have been more than 300 judicial recess appointments in U.S. history, only four of these have been made since 1960.93 Although the 1960 Senate resolution is likely not the only factor in this drastic change, it nonetheless demonstrates the impact that political debate and resolutions, even sharply contested ones, can have on presidential action.

The bitter dispute between the Senate and the President in 1985 demonstrated how the Senate’s use of its other significant appointment-related power94—the advice and consent power—could pressure the President into a political agreement curtailing the breadth of his recess appointment power. On July 30, 1985, when the Senate was preparing to recess for the August break, Democratic Senate Minority Leader Robert Byrd informed Republican President Reagan that the recess should not be considered “the kind of extended recess” during which recess appointments could be made.95 Byrd warned that any recess appointments would “be seen as a deliberate effort to circumvent the Constitutional responsibility of the Senate to advise and consent to such appointments.”96 When President Reagan proceeded to use his recess appointment power during the break, Byrd fought back with the Senate’s advice and consent power. In the fall of 1985, Byrd and Senate Democrats held up action on seventy presidential nominations “touching virtually every area of department the necessary constitutional means and personal motives to resist encroachments of the others.” 97

91. Hartnett, supra note 24, at 434 (citing 106 Cong. Rec. 18130, 18143-44 (1960)).
93. Halstead, supra note 36, at CRS-17. Three of the four judicial recess appointments since 1960 have come since 2000: Clinton’s appointment of Judge Gregory and Bush’s appointments of Judges Pickering and Pryor.
94. The other significant appointment-related power is the appropriations power, used by Congress in enacting the Army Appropriations Act of 1863 and 5 U.S.C. § 5503.
95. 131 Cong. Rec. 22498 (1985). In 1985, the Senate was split 53 Republican / 47 Democrat. See Party Division in the Senate, supra note 51.
96. 131 Cong. Rec. 22498, supra note 95.
the executive branch,” including executive officials and federal judges.97 “[D]eeply displeased” by this, the White House and Republican Senate Majority Leader Bob Dole held a meeting with Byrd to, in Dole’s words, “allay some of the concerns the distinguished minority leader has.”98 The White House ultimately agreed to give notice to the majority and minority leaders far enough in advance of a recess to provide the leaders an opportunity to comment on potential recess appointments.99

During the terms of the last two Presidents—Clinton and Bush—similar deals have overcome impasses between the Senate and the President on recess appointment issues. In June 1999, Democratic President Clinton issued a recess appointment to James Hormel to be the U.S. ambassador to Luxembourg. Republican Senator James Inhofe responded to this eleven-day intrasession recess appointment by announcing: “I am going to do the same thing Senator Byrd did back in 1985: I am putting hold on every single Presidential nomination.”100 Inhofe accused Clinton of treating the Senate’s advice and consent role “as little more than a nuisance which he can circumvent whenever he wants to impose his will on the country.”101 Inhofe vowed that the Republican-controlled Senate would block nominations until Clinton agreed to notify the Senate prior to making recess appointments, and to make only appointments that were “absolutely necessary.”102 In response, Clinton wrote to Senator Lott within a week that his administration “has made it a practice to notify Senate leaders in advance of our intentions in this regard, and this precedent will continue to be observed.”103 Following Clinton’s promise, Inhofe revoked his threat to block nominations.104

98. Id. at CRS-10.
99. Id. at CRS-11. Similarly, in 1989, the reciprocal political pressure applied by Democratic Senate Majority Leader George Mitchell and Republican President George H.W. Bush further illustrates the effectiveness of leaving the recess appointment debate to the political arena. In August 1989, with the Senate split 55 Democrat / 45 Republican, Senator Mitchell warned President Bush not to recess appoint William Lucas to head the Civil Rights Division in the Justice Department after Lucas had been rejected by the Senate Judiciary Committee for that position. Mitchell insisted that sidestepping the Senate by issuing a recess appointment to a nominee who the relevant Senate committee had already rejected “would be a very unwise course of action.” Mitchell Opposes Recess Appointment, Wash. Post, Aug. 5, 1989, at A5; see Party Division in the Senate, supra note 51. Bush ultimately chose not to appoint Lucas during recess, but instead named Lucas to a position that did not require Senate confirmation. See Fisher, Recess Appointments, supra note 12, at CRS-11.
100. Fisher, Recess Appointments, supra note 12, at CRS-12. In 1999, the Senate was split 55 Republican / 45 Democrat. See Party Division in the Senate, supra note 51.
104. Fisher, Recess Appointments, supra note 12, at CRS-13. The reciprocal pressure between the Senate and the President demonstrates how fragile the political balance of power is.
Republican President George W. Bush and a Democratic Senate minority stood in similar disagreement following Bush’s controversial recess appointment of Judge Pryor in February 2004. In March of that year, Democratic Senator Edward Kennedy objected vigorously to Judge Pryor’s recess appointment because it was made during an intrasession recess, \(^{105}\) while his fellow Democrats vowed to block further Bush nominees if the appointment stood. \(^{106}\) In May 2004, Senate Democrats and the White House announced a compromise. Under the terms of the agreement, Bush pledged not to bypass the Senate with any more judicial recess appointments for the remainder of his term. In exchange, the Democrats agreed to confirm twenty-five of the President’s nominees, while continuing to block seven candidates whom they considered “extreme ideologues.” \(^{107}\) Republican Majority Leader Bill Frist and Democratic Senator Charles Schumer were positive about the result. Frist stated that “[i]t’s fair, it’s balanced. Both sides have worked on it for days, and both sides are satisfied,” while Schumer took pride in the Senate Democrats’ political achievement: “The White House waved the white flag here.” \(^{108}\)

In December 2006, President Bush’s acceptance of United Nations Ambassador John Bolton’s resignation represented a victory for the Democratic Senate minority. \(^{109}\) When Bush recess appointed Bolton to the position of United Nations ambassador in August 2005, Democratic senators were incensed. \(^{110}\) When Bolton’s recess appointment approached its end in December 2006, the Democrats in the Senate Foreign Relations Committee refused to allow Bush’s re-nomination of Bolton to reach a full Senate vote. \(^{111}\) The Bush administration and Bolton explored ways to bypass the Senate—such as a second recess appointment—but ultimately concluded that this would only “inflame tensions between Congress and the White House.” \(^{112}\) Although Bush described the opposition within the Senate Foreign Relations Committee as

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\(^{105}\) Mayton, supra note 22, at 553.

\(^{106}\) In 2004, the Senate was split 51 Republican / 48 Democrat. See Party Division in the Senate, supra note 51.


\(^{108}\) Id. Other Senators were admittedly not as positive: Republican Senator Jon Kyl called the agreement “disappointing, but this is the best we can do. . . . It’s very unfair to these people who will not get confirmed.” Id.

\(^{109}\) After the Democrats’ victory in the November 2006 congressional elections, the Senate breakdown—to take effect in January 2007—was 49 Democrat / 49 Republican / 1 Independent / 1 Independent Democrat. In August 2005, when Bolton was recess appointed, the Senate was split 55 Republican / 44 Democrat / 1 Independent. See Party Division in the Senate, supra note 51.

\(^{110}\) Baker, Bolton is Likely to Receive Recess Appointment, supra note 3, at A4.

\(^{111}\) Cooper, supra note 6, at A1.

\(^{112}\) Id.
"stubborn obstructionism" that "disrupt[s] our diplomatic work at a sensitive and important time" and "ill serves our country," he nonetheless relented to Senate opposition in accepting Bolton's resignation.

While the Senate has not directly challenged the constitutionality of the President's broad recess appointment power through litigation or legislation, the Senate has used two of its greatest powers—its appropriations power and its advice and consent power—to effectively curtail the President's otherwise broad authority. The declarations of victory by both Republican and Democratic Senators following the May 2004 agreement with President Bush demonstrate the understanding among both branches that the proper reach of the President's recess appointment power can be and has been successfully resolved in the political arena. Furthermore, the reciprocal pressure exercised between the Senate and the President demonstrates how fragile the political balance of power is. Each branch realizes that excessive use of its powers on the recess appointments issue can potentially bring government to a standstill, an unattractive prospect for all.

II
THE JUDICIARY: ALLOWING THE POLITICAL BRANCHES TO RESOLVE THE LIMITS OF A CONSTITUTIONAL PRACTICE

The federal courts have adjudicated cases involving the Recess Appointments Clause seven times. The first four cases—decided between 1868 and 1886 by federal district courts—involved challenges to the recess appointments of executive officers. The last three cases—decided between 1962 and 2004 by federal appellate courts—involved constitutional challenges to the recess appointments of Article III judges. This Part analyzes the last three cases in particular to examine why the judiciary has upheld the constitutionality of broad recess appointment power with respect to the three textual controversies in the Clause: the expansive interpretation of the term "happen"; the broad definition of "recess"; and Article III-type judicial recess appointments. Ultimately, this Part concludes that by upholding the

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113. Id.
114. Most recently, the Democratic Senate's pro forma sessions in November and December 2007 demonstrate another political power that the Senate possesses to prevent recess appointments. See supra note 7. Although this was the first time that pro forma sessions had been used to block recess appointments, they successfully curtailed the President's power, preventing recess appointments during that period. Hulse, Democrats Move to Block Bush Appointments, supra note 7.
115. Case of District Attorney of United States, 7 F. Cas. 731 (E.D. Pa. 1868); Schenk v. Peay, 21 F. Cas. 672 (E.D. Ark. 1869); In re Farrow, 3 F. 112 (N.D. Ga. 1880); In re Yancey, 28 F. 445 (W.D. Tenn. 1886).
116. United States v. Allocco, 305 F.2d 704 (2d Cir. 1962); United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985); Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004).
117. The first four decisions deserve a brief summary. The two cases, District Attorney, 7 F. Cas. at 731 and Peay, 21 F. Cas. at 672, cast doubt (but do not rule upon) the constitutionality
constitutionality of the practice with respect to all three of these areas, the judiciary has appropriately left resolution of the debate over the proper breadth of the Recess Appointment Clause to the executive and legislative branches.

A. Justifying the Judiciary’s Acceptance of the Constitutionality of Broad Recess Appointment Power

In United States v. Allocco (1962), United States v. Woodley (1985), and Evans v. Stephens (2004), litigants whose cases were heard and decided by recess appointed federal judges brought suit alleging that it was of the “exist” interpretation. In District Attorney, Judge Cadwalader doubted the constitutionality of swearing in John O’Neill, a recess appointee to United States Attorney for the Eastern District of Pennsylvania, because the position had become vacant while the Senate was in session. District Attorney, 7 F. Cas at 731-32. Cadwalader questioned the constitutionality of the “exist” interpretation because he (1) believed it would unconstitutionally infringe on the Senate’s advice and consent role by providing the President with limitless power to recess appoint officers “who would be objectionable to the senate if in session”; (2) believed that claims of congressional acquiescence in the constitutionality of the Recess Appointments Clause were unsubstantiated; and (3) questioned relying upon the support of successive attorneys general for the “exist” interpretation as evidence of its constitutionality. Id. at 734, 737-39, 742. Despite Cadwalader’s doubts about the “exist” interpretation, he conceded that there had been no opportunity for judicial contestation, and the issue, “whenever directly litigated, will be quite open for judicial contestation. At present, I cannot answer it affirmatively.” Id. at 744. As Cadwalader’s opinion was merely advisory and did not decide a case or controversy, it carries little, if any, precedential authority.

Peay, the second case to interpret the word “happen,” held that an office created by the legislature but never filled may not be originally filled through a presidential recess appointment. After Congress created a three-member Tax Commission in June 1862, the positions remained vacant until the President unilaterally filled the office in July 1864 during a Senate recess. Peay, 21 F. Cas. at 685. Peay, who had appeared before the Commission, challenged the constitutionality of the appointment, arguing that a vacancy had not occurred during the Senate recess. Id. at 674. Judge Caldwell cited Judge Cadwalader’s opinion in District Attorney in support of his decision in favor of Peay. Id. at 675. Farrow—the third case to consider the “exist” interpretation—dismissed District Attorney and ignored Peay altogether. In permitting the issuance of a recess appointment for Farrow as U.S. Marshall, Judge Woods discounted the value of District Attorney, holding that the recess appointment was within the President’s power despite the fact that the vacancy arose during the Senate session. Farrow, 3 F. at 115-16. Judge Woods justified his holding by citing (1) the “practice of the executive department of the government for nearly 60 years” and the concurring opinions of ten attorneys general; (2) the attorney general argument that “the power to fill vacancies which occur during the recess has been sanctioned...by the unbroken acquiescence of the senate”; and (3) the 1863 statute limiting appropriations for recess appointees, which demonstrated congressional acquiescence. Id. In re Yancey, the court chose to follow Farrow rather than District Attorney. Judge Hammond recognized the limited precedential value of District Attorney: “Judge Cadwalader calls attention to the difficulty of raising the question for judicial decision, and it is apparent that even that opinion itself is subject to challenge as being only an expression of the learned judge’s views of the question, and not, in a strict sense, an adjudication of it.” Yancey, 28 F. at 447. Hammond ultimately chose “not to attempt to decide this grave question of constitutional construction,” holding that Congress is the appropriate check on the President’s power: “There are criminal penalties prescribed by the legislation of congress designed to protect against executive abuses of this power of appointment....The courts or judges should not undertake any duty in that direction not strictly belonging to them.” Id. at 452. By relying on attorney general opinions, historical executive practice, and Senate acquiescence, Farrow and Yancey set the stage for the federal appeals court decisions of the latter half of the twentieth century.
unconstitutional for an Article III judge without life-tenure to adjudicate a case. In each case, a federal appeals court—the Second Circuit, Ninth Circuit, and Eleventh Circuit, respectively—upheld the constitutionality of the President’s broad power to recess appoint Article III judges, regardless of whether the vacancy occurred prior to or during a Senate recess. These federal appeals courts principally justified their decisions by examining the Clause’s purpose of allowing the President to keep the government running smoothly; by discussing the longstanding acceptance of broad recess appointment power by both the executive and legislative branches; and by citing the structural safeguards in place to prevent the President from abusing his power.

1. Accepting the “Exist” Interpretation

The Allocco, Woodley, and Evans decisions presented two primary reasons for upholding the “exist” interpretation of the term “happen” in the Recess Appointments Clause. First, they held that only broad recess appointment power would fulfill the purpose of the Recess Appointments Clause: to ensure the smooth functioning of government. In Allocco, the Second Circuit upheld the validity of U.S. District Court Judge Cashin’s recess appointment, and accordingly affirmed the defendant’s conviction. The court emphasized the necessity of following the “exist” interpretation to avoid the “manifestly undesirable situation” of leaving both executive and judicial offices vacant during the recess. The “arise” interpretation would, by contrast, “create Executive paralysis and do violence to the orderly functioning of our complex government.”

In Woodley, the Ninth Circuit upheld the “exist” interpretation because “Woodley’s interpretation conflicts with a common sense reading of the word happen.” The purpose of the Clause “was to assure the President the capacity for filling vacancies at any time to keep the Government running smoothly.” In Evans, the Eleventh Circuit similarly emphasized the purpose of the Clause. Before an en banc hearing, Evans challenged the constitutionality of Judge William Pryor’s status as an intrasession recess appointment. 

118. Dominic Allocco, who had been convicted of narcotics violations in a jury trial before Judge Cashin, opposed his conviction on the basis that Judge Cashin’s recess appointment was invalid because it filled a vacancy that occurred during a Senate session. Allocco, 305 F.2d at 705-06.

119. Id. at 712.

120. Woodley, 751 F.2d at 1012 (emphasis in original). In 1981, defendant Janet Woodley was indicted for narcotics violations and tried before Judge Walter Heen, who had been issued a recess appointment by President Jimmy Carter in 1980. When Judge Heen denied Woodley’s motion to suppress, she appealed the denial to the Ninth Circuit. A Ninth Circuit panel, raising sua sponte whether Judge Heen could constitutionally preside over Woodley’s trial, held that Heen could not, and vacated Woodley’s conviction. The Ninth Circuit convened en banc shortly thereafter and reversed the panel’s decision. Woodley, 751 F.2d at 1009-12.

121. Id. at 1013.
appointee and moved to disqualify him from hearing the case. The Eleventh Circuit held that Pryor’s appointment was valid in part because the purpose of the Clause—“to keep important offices filled and the government functioning”—required the “exist” interpretation.

Second, all three appeals courts emphasized the longstanding executive branch support for the “exist” interpretation as well as continued congressional acquiescence to this broad recess appointment power. In Allocco, the court expressed confidence in the integrity of attorney general opinions supporting the recess appointment practice. It rejected Allocco’s claim that attorneys general were simply advocates for the President: “the President and his Attorney General are sworn to uphold the Constitution. In exercising his duty to execute the laws faithfully, the President must in the first instance decide whether he acts in accordance with his constitutional powers.” The Allocco court also stressed that Congress’s 1940 amendments to the Army Appropriations Act of 1863 had “implicitly recognized” the President’s power to fill vacancies that arose when the Senate was in session, since the 1940 amendments authorized payment of a greater number of recess appointees’ salaries than the original 1863 statute had allowed.

The Woodley court similarly cited the acceptance of the practice by all three branches. Not only had the Allocco court and the executive branch supported the constitutionality of the “exist” interpretation, but the legislative branch had also “apparently recognized the soundness of this construction of the recess power.” Specifically, Congress had in § 5503(a)(2) provided for payment of recess appointees—such as the judge at issue, Judge Walter Heen—whose nominations were pending at the time of the Senate’s recess.

Finally, the Evans court asserted that the “exist” interpretation was consistent “with the understanding of most judges that have considered the question, written executive interpretations from as early as 1823, and legislative acquiescence.” In addition, the Eleventh Circuit voiced the court’s presumption of trust in the executive branch as a shield against abuse of the

122. Evans originally brought suit in the United States District Court for the Northern District of Georgia against a police officer for allegedly unconstitutionally subjecting him to a strip search and body cavity search. The district court dismissed the officer’s motion for summary judgment. The Eleventh Circuit affirmed in part, reversed in part, and remanded, but then vacated the opinion and decided to rehear the case en banc. Evans, 387 F.3d at 1221-22.
123. Id. at 1224.
124. U.S. Attorneys General have unanimously supported the “exist” interpretation since 1823. See supra note 36 and accompanying text.
125. Allocco, 305 F.2d at 713.
126. Id. at 714.
127. Woodley, 751 F.2d at 1013.
128. Id. 5 U.S.C. § 5503(a)(2) allowed for the payment of a recess appointee’s salary if the “nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate” recessed.
129. Evans, 387 F.3d at 1226.
Recess Appointments Clause:

The Judicial Branch is the controlling interpreter of how the Constitution applies. But the President, in his capacity as chief executive of this country, is also sworn to uphold the Constitution. And when the President is acting under the color of express authority of the United States Constitution, we start with a presumption that his acts are constitutional.  

2. Allowing Intrasession Recess Appointments

In the only case to address the definition of “recess,” the Eleventh Circuit in Evans upheld the constitutionality of Judge Pryor’s recess appointment during a ten-day recess, finding that the language, history, and purpose of the Clause all supported intrasession recess appointments. The court rejected Evans’s argument that the plain meaning of the phrase “the recess of the Senate” in the Clause only allowed the President to make recess appointments during intersession recesses. Instead, the court stated “that ‘the Recess,’ originally and through today, could just as properly refer generically to any one—intrasession or intersession—of the Senate’s acts of recessing, that is, taking a break.” Furthermore, the court declined to explicitly establish a constitutionally minimum length for Senate recesses to authorize recess appointments. “[W]e do not set the limit today,” the court stated.

Turning to the history of intrasession recess appointments, the court emphasized that although a president had never before appointed an Article III judge during an intrasession recess as short as ten days, Presidents had recess appointed executive officers during intrasession recesses of the same length or shorter. Moreover, the court noted that twelve presidents had made more than 285 intrasession recess appointments without prior complaint. Finally, the court asserted that the main purpose of the Recess Clause—“to enable the President to fill vacancies to assure the proper functioning of our government”—supported the constitutionality of both intrasession recesses and intersession recess appointments.

3. Upholding the Constitutionality of Issuing Recess Appointments to Article III Judges

The Allocco, Woodley, and Evans courts also upheld the constitutionality

130. Id. at 1222.
131. Id. at 1224-25.
132. Id. at 1225.
133. Id. at 1225-26.
134. Id. at 1226. Furthermore, the court noted that it is “entirely possible” that an intersession recess might be shorter than an intrasession recess. Thus, the “purpose of the Clause is no less satisfied during an intrasession recess than during a recess of potentially even shorter duration that comes as an intersession break.” Id.
of issuing recess appointments to Article III judges. The courts focused on three primary justifications. First, they supported their findings on textual grounds. In *Allocco*, the Second Circuit explained that the Recess Appointments Clause expressly empowers the President to fill "all vacancies" that would normally be filled only with the advice and consent of the Senate. As this describes judicial vacancies, it followed that the President had power to fill these vacancies by recess appointment as well. In *Woodley*, the Ninth Circuit agreed with this interpretation, rejecting the argument that the more specific language of Article III should trump the more general language of the Recess Appointments Clause. The court asserted "that '[t]he Constitution must be regarded as one instrument, all of whose provisions are to be deemed of equal validity.' . . . There is therefore no reason to favor one Article over the other." Likewise, the *Evans* court also held that the "all vacancies" language in the Recess Appointments Clause must include Article III judges.

Second, the three appeals courts cited the long-standing acceptance of the practice by all three branches of government. In *Allocco*, the Second Circuit held that the practice of recess appointing federal judges had "become so common" that there were approximately 50 federal judges sitting under recess appointments. In *Woodley*, the Ninth Circuit similarly cited the executive branch's approximately 300 judicial recess appointments since the nation's founding. Furthermore, the legislative branch had consistently confirmed judicial recess appointees "without dissent," and Congress had passed legislation providing for the salaries of recess appointees without excluding judges. The *Evans* court reiterated that history had demonstrated the agreement of all three branches to this practice.

Finally, all three courts emphasized that the temporary nature of the appointments did not pose an irreconcilable conflict with the judicial life-tenure or salary protection requirements of Article III. The *Allocco* court expressed faith that the judicial appointees would be able to remain free from inordinate political influence: "The evils of legislative and executive coercion which petitioner foresees have no support in our nation's history." In *Woodley*, the court emphasized that the short life of such appointments was an essential

135. *Allocco*, 305 F.2d at 708 (citing U.S. CONST. art. II, § 2, cl. 3).
136. Id. (citing U.S. CONST. art. II, § 2, cl. 2-3).
137. U.S. CONST. art. III, § 1 states the life-tenure requirement (judges "shall hold their Offices during good Behaviour") and the salary protection requirement (judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.")
138. United States v. Woodley, 751 F.2d 1008, 1009-10 (9th Cir. 1985) (quoting, in part, Prout v. Starr, 188 U.S. 537, 543 (1903)).
139. *Evans*, 387 F.3d at 1223.
140. *Allocco*, 305 F.2d at 709.
141. *Woodley*, 751 F.2d at 1011.
142. *Evans*, 387 F.3d at 1223.
143. *Allocco*, 305 F.2d at 709.
safeguard against separation of powers conflicts, arguing that a judicial recess appointee should be viewed "not as a danger to the independence of the judiciary, but as the extraordinary exception to the prescriptions of article III."\textsuperscript{144} The Eleventh Circuit was similarly reassured in \textit{Evans}: "[W]hile recess appointees may not have every bit of the protection for their independence that regularly confirmed Article III judges have, we accept the Framers thought that what might be intolerable, if prolonged, was acceptable for a relatively short while."\textsuperscript{145}

\textbf{B. The Recess Appointment Power: A Political, Not a Constitutional Conflict}

Why did the Second, Ninth, and Eleventh Circuits reject the separation of powers concerns voiced by the plaintiffs in \textit{Allocco}, \textit{Woodley}, and \textit{Evans}, respectively?\textsuperscript{146} Two primary reasons stand behind the courts’ decisions to uphold the constitutionality of broad presidential recess appointment power. First, arguments raised by Justices Frankfurter and Jackson in \textit{Youngstown Sheet & Tube Co. v. Sawyer} \textsuperscript{147}—perhaps the most famous separation of powers case of the twentieth century—provided a particularly useful analytical framework upon which the courts could base their decisions in favor of presidential power. Second, the "political question" or "non-justiciability" doctrine, discussed in \textit{Evans}, strongly supports a judicial decision to permit political resolution of the recess appointment conflict. In the end, both \textit{Youngstown} and the political question doctrine convinced the courts that a broad recess appointment power does not create a constitutional separation of powers conflict. Instead, it creates a political conflict best left to the legislative and executive branches to resolve.

\textbf{1. The Youngstown Concurrences: A Framework for the Judiciary’s Recess Appointment Power Decisions}

In justifying its reliance on the history of attorney general support for the President’s broad recess appointment power, the Second Circuit in \textit{Allocco} cited Justice Frankfurter’s famous concurrence in \textit{Youngstown}:

It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of

\begin{itemize}
  \item \textsuperscript{144} \textit{Woodley}, 751 F.2d at 1014.
  \item \textsuperscript{145} \textit{Evans}, 387 F.3d at 1224.
  \item \textsuperscript{146} The author recognizes that the \textit{Woodley} and \textit{Evans} cases had dissenting opinions, but has determined that their conclusions are not relevant to the functional focus of this paper: to explain why the branches have accepted broad recess appointment power.
  \item \textsuperscript{147} \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579 (1952).
\end{itemize}
power part of the structure of our government, may be treated as a gloss on "Executive Power" vested in the President by § 1 of Article II.\textsuperscript{148}

Justice Frankfurter's words resonate in the decisions and rationale of all three Courts of Appeals decisions addressing the constitutionality of the Recess Appointments Clause. The favoring of purpose over text, the deference given to an uncontested historical practice, and the faith in the President's integrity lie at the heart of the judiciary's twentieth-century approach to recess appointment litigation.

Equally applicable (though not mentioned in any of the three cases) is Justice Jackson's \textit{Youngstown} concurrence, which also provides a useful framework to better understand the judiciary's approach to the recess appointment conflict. Jackson set forth a separation of powers jurisprudence much like the one proposed by James Madison in The Federalist No. 51,\textsuperscript{149} writing:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated causes or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.\textsuperscript{150}

Justice Jackson described a spectrum of three "practical situations" in which the legal legitimacy of presidential power might be measured. In the first, the President's authority is at its greatest because he acts "pursuant to an express or implied authorization of Congress" and his authority "includes all that he possesses in his own right plus all that Congress can delegate."\textsuperscript{151} Under these circumstances, the President's action "would be supported by the strongest of presumptions and the widest of latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."\textsuperscript{152} In the second situation, where the President acts "in absence of either a

\textsuperscript{148} Allocco, 305 F.2d at 713-14 (citing Youngstown, 343 U.S. at 610-11 (Frankfurter, J., concurring)).

\textsuperscript{149} Madison wrote in \textit{The Federalist No. 51}:
To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. \textit{The Federalist} No. 51 (James Madison), \textit{supra} note 90, at 320.

\textsuperscript{150} Youngstown, 343 U.S. at 635 (Jackson, J., concurring).

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{Id.} at 637.
congressional grant or denial of authority,” his power is diminished because the President “can only rely upon his own independent powers.”\footnote{153} Jackson remarks, however, that “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”\footnote{154} Finally, the President’s power is at its lowest ebb when he “takes measures incompatible with the expressed or implied will of Congress.”\footnote{155} Here, the President “can rely only upon his own constitutional powers minus constitutional powers of Congress over the matter;” such an executive “claim to power” must be “scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”\footnote{156}

This threefold framework sheds further light on the Courts of Appeals’ recess appointment decisions.\footnote{157} In \textit{Youngstown}, Justice Jackson found that President Truman’s executive order ordering seizure of steel companies fell into the third category: an action incompatible with the express will of Congress.\footnote{158} Because seizure was a legislative power granted to Congress in Article I, Jackson concurred that without legislative support the President’s actions were unconstitutional.\footnote{159} In contrast, Jackson’s framework provides strong support for the judiciary’s position to uphold the President’s broad recess appointment power. First, unlike the executive order in \textit{Youngstown}, the recess appointment power is an executive power granted to the President in Article II of the Constitution. Second, the appeals courts clearly viewed the President’s actions as falling into the first \textit{Youngstown} category. Through its 1863 statute denying payment to recess appointees whose appointment violated the “arise” interpretation, Congress impliedly agreed to the constitutionality of the “exist” interpretation. After the 1940 amendments creating exceptions to withholding payment, congressional authorization seems even stronger. Even if these appeals courts considered these statutes as signs of mere congressional “quiescence” rather than congressional approval (which would drop the President’s action into the second category of the Jackson analysis), the

\begin{itemize}
\item 153. \textit{Id.}
\item 154. \textit{Id.}
\item 155. \textit{Id.}
\item 156. \textit{Id.} at 637-38.
\item 157. To be sure, \textit{Youngstown} dealt with a different issue than did \textit{Allocco}, \textit{Woodley}, and \textit{Evans}—namely, whether President Truman’s executive order directing seizure of steel companies during the Korean War was constitutional. In \textit{Youngstown}, the Supreme Court held that seizure of steel companies was a legislative, not an executive power. Thus, Truman’s seizure was held to be unconstitutional. In the recess appointment cases, the issue was not whether the recess appointment power was executive or legislative, but whether it was within the President’s constitutional power to make recess appointments (1) to fill vacancies that did not occur during the recess, (2) during intrasession recesses, and (3) of Article III judges. Nonetheless, the issue of whether certain actions are within the President’s constitutional power is central to \textit{Youngstown} and the recess appointment cases. \textit{Youngstown}, 343 U.S. at 587-88.
\item 158. \textit{Id.} at 640 (Jackson, J., concurring).
\item 159. \textit{Id.} at 653.
\end{itemize}
President's recess appointment power would likely still be upheld as relying "upon his own independent powers" found in the Recess Appointments Clause itself.160

Under Jackson's framework, it seems that only if Congress or the Senate had challenged the President's power through legislation or litigation (category three of the Jackson analysis) would the appeals courts have closely questioned whether the President's "constitutional powers minus constitutional powers of Congress" offered a sufficient basis upon which to uphold the practice. Even in such a case, however, the President's actions would likely still be held constitutional because the Constitution expressly delegates the power to make recess appointments to the President, and it therefore lies within "his own independent powers." As demonstrated, Justice Jackson's framework is helpful in analyzing the appeals courts' decisions,161 and serves as a predictor for how other courts might resolve future recess appointment litigation.

2. The President's Use of His Discretionary Power: A Political Question

While the Youngstown concurrences influenced the three appeals courts' decisions to uphold the constitutionality of broad recess appointment power, the political question doctrine motivated the Evans court to allow the political branches to determine the limits of that power. The Evans court concluded that it had fulfilled its "duty to construe and to apply the Constitution as it is written" by finding that the "Constitution gives to the President the discretionary authority to appoint a judge to fill a vacancy on an Article III court during a ten- or eleven-day intrasession recess."162 But the court refused to address a separate issue raised by plaintiff Evans—that the President misused this discretionary appointment authority by "circumvent[ing] and show[ing] an improper lack of deference to the Senate's advice-and-consent role" through his recess appointment of Judge Pryor after the Senate had blocked confirmation.163

The court refused to address Evans's argument because it "presents a political question that moves beyond interpretation of the text of the Constitution and on to matters of discretionary power, comity, and good policy."164 The court held:

These matters are criteria of political wisdom and are highly

160. See id. at 637.

161. It is also worth noting that the Solicitor General's arguments defending President Truman's seizure were almost identical to the opinions of attorneys general defending broad executive recess appointment power. Specifically, the Solicitor General argued that the Vesting Clause (in U.S. Const. art. II, § 1, cl. 1), the Take Care Clause (in U.S. Const. art. II, § 3), and the historical practice of prior Presidents supported Truman's executive action. See id. at 640, 646, 648.


163. Id.

164. Id.
subjective. They might be the proper cause for political challenges to
the President, but not for judicial decision making: we lack the legal
standards—once we move away from interpreting the text of the
Constitution—to determine how much Presidential deference is due to
the Senate when the President is exercising the discretionary authority
that the Constitution gives fully to him.\footnote{165}

The political question doctrine applies where there is “a textually
demonstrable constitutional commitment of the issue to a coordinate political
department” or “a lack of judicially discoverable and manageable standards for
resolving it.”\footnote{166} The Evans court explicitly found that there were no “legal
standards” to resolve the issue of the President’s use of his discretionary power,
specifically how much deference he must show the Senate. Furthermore, in
holding broad presidential recess appointment power constitutional, the court
also determined that the text of the Constitution had committed discretionary
power to the executive branch. Because the matter was a political question, the
court concluded that the extent of the President’s discretionary power should be
decided by the President and the Senate within the political arena. This decision
is in harmony with the current practice between the Senate and the President of
determining the limits of the President’s discretionary power not through
litigation, but through political debate and compromise.\footnote{167}

The Evans court’s decision mirrors the rulings in two famous political
question cases: Goldwater v. Carter\footnote{168} and Nixon v. United States.\footnote{169} The Supreme Court held in Goldwater that whether the President had the power to
terminate a treaty without congressional approval was “a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government.”\footnote{170} The Goldwater Court found that
“while the Constitution is express as to the manner in which the Senate shall partake in the ratification of a treaty, it is silent as to that body’s participation in the abrogation of a treaty.”\footnote{171} Goldwater directly parallels Allocco, Woodley, and Evans. While the Appointments Clause expressly
provides for the Senate’s advice and consent role, the Recess Appointments Clause is silent about the Senate’s role in restraining the President’s
discretionary authority. As to both treaty termination and recess appointments,
the courts have determined that the Constitution committed the power to the
executive branch.

Furthermore, the Goldwater Court held that it lacked judicially

\footnotesize{\begin{itemize}
\item \footnote{165. Id.}
\item \footnote{166. Baker v. Carr, 369 U.S. 186, 217 (1962).}
\item \footnote{167. See supra Part I.B.3 (examining numerous examples of political compromise between the President and the Senate over potential recess appointments).}
\item \footnote{168. 444 U.S. 996 (1979).}
\item \footnote{169. 506 U.S. 224 (1993).}
\item \footnote{170. Goldwater, 444 U.S. at 1003.}
\item \footnote{171. Id.}
\end{itemize}
manageable standards for resolving the case. The Court emphasized that the treaty termination dispute should be left to the political arena because it was "between coequal branches of our Government, each of which has resources available to protect and assert its interests." Similarly, in the recess appointment arena, Congress can and has used its appropriations and advice and consent powers politically to influence the President's discretionary authority. The Goldwater Court cited Court of Appeals Judge Wright's reasoning: "As our political history demonstrates, treaty creation and termination are complex phenomena rooted in the dynamic relationship between the two political branches of our government. We thus should decline the invitation to set in concrete a particular constitutionally acceptable arrangement by which the President and Congress are to share treaty termination." This final justification precisely underlies the rationale in the recess appointment cases for leaving the question of the President's discretion to the political arena: that the Senate and the President should determine the appropriate limits of the recess appointment power.

In Nixon v. United States, the Supreme Court held that it was a nonjusticiable political question whether Article I, Section 3, Clause 6's provision that "the Senate shall have the sole Power to try all Impeachments" required that the whole Senate take part in the evidentiary hearings. The Court found that the Constitution granted the Senate the power to determine the meaning of the word "try." As to the judiciary's role, the Court explained that it agreed with Nixon that "courts possess power to review either legislative or executive action that transgresses identifiable textual limits." But the Court concluded that the word "try" in the Impeachment Clause "does not provide an identifiable textual limit on the authority which is committed to the Senate." In the recess appointment cases, the courts similarly found that there is no textual limit on the President's discretionary authority. Because the Evans court

172. Id. at 1004. The Court cited Court of Appeals Judge Wright's opinion as support: Congress has a variety of powerful tools for influencing foreign policy decisions that bear on treaty matters. Under Article I, Section 8 of the Constitution, it can regulate commerce with foreign nations, raise and support armies, and declare war. It has power over the appointment of ambassadors and the funding of embassies and consulates. Congress thus retains a strong influence over the President's conduct in treaty matters. Id. at 1004 n.1.

173. Also at 1004. The Court cited Court of Appeals Judge Wright's opinion as support: Congress has a variety of powerful tools for influencing foreign policy decisions that bear on treaty matters. Under Article I, Section 8 of the Constitution, it can regulate commerce with foreign nations, raise and support armies, and declare war. It has power over the appointment of ambassadors and the funding of embassies and consulates. Congress thus retains a strong influence over the President's conduct in treaty matters. Id. at 1004 n.1.

174. See supra Part I.B.3 for examples of congressional influence at work in presidential recess appointment decisions.

175. Goldwater, 444 U.S. at 1004 n.1. Moreover, Professor Laurence Tribe has emphasized the parallel structure of the Treaty Clause and Appointments Clause in U.S. Const. art. II, § 2, cl. 2: "Although the Constitution is not seamless and completely consistent, the Appointments Clause in the second half of clause 2 must at least be considered in interpreting the Treaty Clause in the first half of clause 2." Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1273 (1995).


177. Id. at 238.

178. Id.
held that the Constitution fully grants the President recess appointment authority, the court declined to create a legal standard limiting that authority. Instead, it appropriately left the issue to the political arena.

III
THE LEE AND PICKERING APPOINTMENT BATTLES:
DEMONSTRATING THE VALUE OF BROAD RECESS APPOINTMENT POWER

Parts I and II of this paper examined the reasons behind the legislative and judicial branches' long acceptance of broad presidential recess appointment power. This Part addresses a question that naturally arises from this discussion: even if deemed constitutional, does the current recess appointment practice also support the effective functioning of government? This Part argues that it does by examining the most bitter appointment battles between the President and the Senate in recent years: President Clinton's appointment of Bill Lann Lee to Assistant Attorney General for Civil Rights in 1997 and President Bush's recess appointment of Charles Pickering to the Fifth Circuit Federal Court of Appeals in 2004.

At first glance, these two appointment battles may seem to challenge the conclusions drawn in Parts I and II. In both instances, the President and the Senate were unable to resolve their differences through a political bargain, ultimately leading the President to undermine the Senate's confirmation role through a unilateral appointment. Members of the Senate opposition angrily questioned the political and constitutional legitimacy of this outcome. Despite this tension, however, broad recess appointment power serves a valuable role even in such extreme cases for two important reasons. First, temporary appointments—whether recess appointments or acting appointments under the Vacancies Act—179—are constitutionally sound solutions that do not jeopardize the Senate's advice and consent role. Second, broad recess appointment power is superior to appointment process alternatives—specifically the use of acting appointments and the narrow recess appointment power advocated by Professors Rappaport, Carrier, and Mayton180—in ensuring the smooth functioning of government.

A. The "Acting" Appointment of Bill Lann Lee

The case of Bill Lann Lee demonstrates that temporary appointments do not endanger the Senate's advice and consent role, even when they cause bitter conflict between the President and the Senate. Furthermore, of the temporary appointment alternatives, recess appointments are superior to acting appointments in ensuring the smooth functioning of government.

On January 20, 1997, the office of Assistant Attorney General for Civil

180. See generally supra notes 28, 30, 31.
Rights became vacant when Deval Patrick resigned.\textsuperscript{181} Patrick's deputy, Isabelle Pinzler, became Acting Assistant Attorney General, as provided under the Vacancies Act.\textsuperscript{182} Six months later, President Clinton nominated Bill Lann Lee, a lawyer with the NAACP Legal Defense and Educational Fund, to Patrick's post, while Pinzler continued to serve pending Lee's confirmation.\textsuperscript{183} Republicans in the Senate Judiciary Committee objected to Lee, whom they found had been too radical in his support of affirmative action and racial preferences, particularly after recent court rulings restricting such programs.\textsuperscript{184} On November 13, 1997, the Committee—comprised of ten Republicans and eight Democrats—was deadlocked, with all but one Republican planning to vote against Lee, "effectively dooming [Lee's] nomination."\textsuperscript{185} Committee Democrats prevented a formal vote in the hope of resuming the discussions when the Senate reconvened in January 1998, and the Committee sent Lee's nomination back to the White House.\textsuperscript{186} On December 15, 1997, however, President Clinton unilaterally named Lee Acting Assistant Attorney General for Civil Rights, avoiding the Senate confirmation necessary for a permanent appointment.\textsuperscript{187}

President Clinton gave Lee an acting appointment rather than a recess appointment because he believed it would be less of an affront to the Senate's advice and consent power. Senator Orrin Hatch, Chairman of the Judiciary Committee, agreed that an acting appointment was "not quite the finger in the eye that a recess appointment would be."\textsuperscript{188} Acting appointments are provided for by the Vacancies Act, first enacted in 1868 and amended most recently in 1994 and 1998.\textsuperscript{189} Congress passed the Vacancies Act as an alternative to the Appointments and Recess Appointments Clauses, thus authorizing the President to fill vacancies temporarily before beginning the Senate confirmation process required for permanent appointments.

Under the Act as it stood in 1997, when an officer of a bureau of an executive or military department—whose appointment was not vested in the head of the department—vacated his office by death, resignation, sickness, or


\textsuperscript{182} See 5 U.S.C. §§ 3345-3346 (authorizing a first assistant temporarily to take over his or her officer's position in an "acting" capacity).

\textsuperscript{183} Will, \textit{Time to Evict}, supra note 181, at A23.


\textsuperscript{185} \textit{Id.}

\textsuperscript{186} \textit{Id.}


\textsuperscript{188} \textit{Id.}

other absence, his first assistant temporarily took over the officer's duties. Alternatively, the President could direct another, previously Senate-confirmed officer to leave his office and temporarily serve in the vacated post. The Vacancies Act limited the term of temporary service to 120 days. The limited term of the temporary appointment and the strict eligibility requirements were meant to maintain "the constitutional division of the appointment power between the President and the Senate while ensuring the smooth functioning of government when vacancies occur."

Although Senator Hatch found Lee's acting appointment less disrespectful of the Senate than a recess appointment, other observers argued that Lee's acting appointment was illegal. In January 1998, the Congressional Research Service stated in a memorandum that the Vacancies Act was "not available for the Lee designation" because the 120-day period had been exhausted by the 181-day tenure of then-Acting Assistant Attorney General Pinzler before Clinton announced Lee's appointment. The memorandum maintained that "the sole lawful option immediately available" to Clinton was to issue a recess appointment to Lee before Congress reconvened on January 27. The Clinton Administration contended, however, that another federal law superseded the Vacancies Act and gave the attorney general the power to make temporary law enforcement assignments for any duration.

Editorials and legal articles alike rejected the merits of this argument and lambasted Clinton for what they regarded as an unconstitutional circumvention of the Senate's confirmation role. They maintained that Clinton even had acknowledged the unconstitutionality of his appointment when he stated: "I have done my best to work with the United States Senate in an entirely constitutional way. But we had to get somebody into the Civil Rights Division." Journalist George F. Will wrote that "the nation has become used to the mincing language by which Clinton describes his lawlessness." Steven Duffield and James Ho asserted that "[t]he Lee appointment is an egregious act

195. Id.
196. Duffield & Ho, supra note 193, at 353-54. The Justice Department claimed authority to make vacancy appointments within the Department free from the constraints of the Vacancies Act pursuant to 28 U.S.C. 6510, which provides: "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." Id. at 354.
197. See id. at 336.
of an executive attempting to undermine the constitutional structure of our representative government. . . . [I]f left unchallenged, [it] constitutes a dangerous step toward total abrogation of the Senate prerogative and duty to confirm officers throughout the executive branch."\(^{199}\)

Despite the uproar over Lee's acting appointment, the Senate did not challenge Clinton's "lawlessness." Assistant Attorney General Andrew Fois wrote to Senator Hatch in January 1998 that the President would promptly renominate Lee when the Senate reconvened and that Lee would serve in an acting capacity until the Senate voted on his nomination.\(^{200}\) When Clinton renominated Lee in February 1998, however, Senator Hatch refused to hold further Senate Judiciary Committee hearings, asserting that "the committee has spoken on the nomination and . . . foresees no further action on the nomination."\(^{201}\) When Clinton again attempted to renominate Lee in March 1999, Senator Hatch once more refused to hold committee hearings.\(^{202}\) Finally, in August 2000, Clinton issued a recess appointment to Lee for the position he had held in "acting" capacity since December 1997.\(^{203}\) Lee served as Assistant Attorney General for Civil Rights until the end of the Clinton Administration in January 2001.

The bitter dispute between President Clinton and the Republican-controlled Senate Judiciary Committee over Lee's appointment raises two important questions: (1) do temporary appointments jeopardize the Senate's advice and consent role, and (2) is the use of broad recess appointment power the most effective alternative to ensure the smooth functioning of government? As to the first question, the Lee case demonstrates that temporary appointments—whether acting appointments or recess appointments—do not endanger the Senate's confirmation role. Senator Hatch and the Senate Judiciary Committee had three opportunities to send the Lee nomination to the full Senate for an up-or-down vote. Each time the Committee refused to vote on Lee. Considering that the Republicans controlled the Senate 55-45 throughout this period, one wonders why Senator Hatch would not be eager to send the nomination to the full Senate for a likely rejection of Lee. The simple answer is that it is a longstanding, official rule of the Senate that if a nominee does not receive a favorable vote from the respective Senate committee, his nomination is not sent to the full Senate.\(^{204}\) It could also be that Senator Hatch was not confident that the full Senate would reject Lee, particularly considering the

199. Duffield & Ho, supra note 193, at 358.
controversial issues of race and civil rights that Senate Republicans’ votes would raise.\(^{205}\)

Regardless of the reason for not submitting the vote to the full Senate, Senator Hatch and fellow Senate Republicans had the power to reject Lee’s nomination. Had they done so after his acting appointment, Lee would have been removed from office. George F. Will asserted that the Senate was “fully complicit in the lawlessness of the Lee appointment. Indeed, the Senate is the most culpable party.”\(^{206}\) Will argued that the Framers “assumed the system of separation of powers would be preserved by each institution’s prickly vigilance in defense of its prerogatives. . . . ‘[N]o serious abuse of power can take place without the cooperation of two coordinate branches of the government.’”\(^{207}\)

Instead of addressing Lee’s appointment to an “acting” position directly, the Senate joined the House to enact the Federal Vacancies Reform Act of 1998 (“Reform Act”). The Reform Act sought to “bring[] to an end a quarter-century of obfuscation, bureaucratic intransigence, and outright circumvention” through three primary amendments.\(^{208}\) First, the Reform Act was intended to prevent another seemingly illegal appointment like Lee’s by stating explicitly that the Vacancies Act is the exclusive statutory means for temporarily filling vacant advice and consent positions in the executive branch, unless Congress explicitly legislates otherwise.\(^{209}\) Second, the Reform Act broadened the Vacancies Act’s applicability by creating a third category of individuals who may serve in an acting capacity.\(^{210}\) Finally, the Reform Act provided the President with more time to nominate a permanent replacement by increasing the length of an acting appointment to 210 days.\(^{211}\) Just as Congress responded indirectly through legislation to limit broad recess appointment power in 1940—as described in Part I.A.1 of this paper—Congress chose to oppose Lee’s statutory appointment indirectly through the Reform Act in 1998.

Although Lee’s acting appointment did not diminish the Senate’s advice and consent power, can one say the same about a recess appointment? One could argue that if the full Senate had rejected Lee, Clinton could have subsequently used a recess appointment to circumvent the Senate’s confirmation power.\(^{212}\) This is a legitimate concern. Furthermore, if the Senate

\(^{205}\) See An Opportunity on Civil Rights, supra note 202, at A22.

\(^{206}\) Will, Back to Bill, supra note 198, at C7.

\(^{207}\) Id. (quoting Justice Joseph Story).


\(^{209}\) 5 U.S.C. § 3347(a). This prevents agencies from using “enabling statutes” as an alternative basis for filling vacancies, which the Justice Department had used to justify Lee’s appointment.

\(^{210}\) 5 U.S.C. § 3345(a)(3). For this third category, the President may designate any officer or employee of the same agency to serve as an acting official for a post otherwise requiring Senate confirmation, as long as that officer has served for at least ninety days during the year prior to the departure of the original officer, and has achieved sufficient salary seniority.

\(^{211}\) 5 U.S.C. § 3346.

\(^{212}\) See Hogue, supra note 9, at CRS-5 (Mar. 15, 2005).
hypothetically had rejected Lee upon renomination, after Lee finished serving
his recess appointment at the end of the next Senate session, the President could
simply have reappointed Lee to another recess appointment. This fact is
equally troubling and seems to demonstrate the danger recess appointments
pose to the Senate's advice and consent power.

There are, however, three strong practical reasons that serve to diminish,
if not fully alleviate, these concerns. First, as discussed in Part I.A.1 of this
paper, Congress has the appropriations power under 5 U.S.C. § 5503 to deny
salary to a recess appointee whose nomination has been rejected by the
Senate. Second, the Senate's advice and consent power serves as a powerful
tool to prevent such extreme hypothetical scenarios from becoming reality.
In the Lee case, President Clinton chose an acting appointment for Lee rather
than a recess appointment precisely because he worried about the retaliatory
powers of the Senate. Just days before Clinton's acting appointment of Lee,
Senate Republicans threatened to block Clinton nominees and freeze money for
Clinton Administration programs if the President made a recess
appointment. Finally, such extreme hypotheticals have yet to occur in fact—
and because of the threat of the Senate's powers and the political backlash that
might follow, there is no reason to think that such presidential abuse of the
recess appointment power will ever occur.

The Lee appointment dispute also raises the question of whether recess
appointments or acting appointments are superior in ensuring the smooth
functioning of government. Although neither is ideal, broad recess appointment
power best supports effective government. In an ideal world, no superior
officer would serve in the federal government without having been confirmed
to a permanent position by the Senate. In such a world, every presidential
nomination would be presented to the Senate, which would promptly confirm
or reject the nominee in its advice and consent role. If the nominee were
rejected, the President would inevitably introduce another nominee of whom
the Senate approved.

213. Id. at CRS-6.
215. See supra Part I.B.3 for examples.
216. John M. Broder, "Problems" Vowed on Rights Appointment, N.Y. TIMES, Dec. 13,
217. President Bush's decision in December 2006 not to issue a recess appointment to John
Bolton for a second time to the position of United Nations ambassador is a case in point. Although
Bush was willing to endure harsh Senate criticism for his decision to recess appoint Bolton in
August 2005, had a strong desire to retain Bolton as U.N. ambassador, and was highly critical of
the Senate Foreign Relations Committee's refusal to send Bolton's nomination to the full Senate
for a vote in December 2006, Bush accepted Bolton's resignation. Bush was unwilling to issue a
second recess appointment to Bolton when it "was almost certain to inflame tensions between
Congress and the White House." Cooper, supra note 6, at A1; see Baker, Bolton is Likely to
Receive Recess Appointment, supra note 3, at A4.
218. Inferior officers would of course be exempted from the Senate's advice and consent if
provided for by Congress, as stated in U.S. CONST. art. II, § 2.
Such an ideal world, however, has never existed. The Framers first acknowledged this fact in creating the Recess Appointments Clause. They realized that prolonged vacancies in executive and judicial offices prevented the smooth functioning of government and thus should be temporarily filled even without the Senate’s advice and consent.\textsuperscript{219} Congress realized this as well when enacting the Vacancies Act in 1868 and amending it in 1994 and 1998. Congress wanted to diminish the length of vacancies by temporarily filling such offices with subordinates while the President nominated a permanent replacement to the Senate.

Professor Rappaport argues that the availability of acting appointments under the Vacancies Act coupled with a narrow recess appointment power would ensure the effective functioning of government.\textsuperscript{220} In other words, where a vacancy has occurred during a Senate session or an intrasession recess presents itself, an acting appointment sufficiently fills the role of broad recess appointment power. This is, however, not the case. Broad recess appointment power best ensures the smooth functioning of government for three reasons. First, an acting appointment lacks the relative stability of a recess appointment. While an acting appointee remains in office for 210 day intervals,\textsuperscript{221} a recess appointment lasts at least a year if made during an intersession recess, and up to almost two years if made during an intrasession recess.\textsuperscript{222} Accordingly, the particular executive-branch agency will be certain of the duration of a recess appointed leader’s tenure, while an acting-appointed head could be replaced at any time. Furthermore, while a recess appointee will serve out his temporary term regardless if the Senate rejects him upon renomination, an acting appointee is removed from office immediately if rejected by the Senate.\textsuperscript{223}

Second, acting appointees arguably enjoy less legitimacy than recess appointees. They were not hand-selected by the President for the position, as is the case with recess appointees, but instead briefly fill the post while the President searches for a permanent replacement. Rappaport argues that acting appointees are more legitimate because they were confirmed by the Senate for their previous position.\textsuperscript{224} This is, however, not strictly accurate. Neither the first category of acting appointees—the first assistant to the vacant office—nor the new third category created in the Reform Act require the appointee to have been Senate-confirmed for his previous position.\textsuperscript{225} Furthermore, one could argue that acting appointees are less likely to garner the loyalty of inferiors and more reluctant to make difficult decisions than recess appointees because of

\begin{footnotesize}
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    \item \textsuperscript{219} See \textit{The Federalist} No. 67 (Alexander Hamilton), \textit{supra} note 17.
    \item \textsuperscript{220} Rappaport, \textit{supra} note 23, at 1514-17.
    \item \textsuperscript{221} See 5 U.S.C. § 3346.
    \item \textsuperscript{222} See \textit{supra} note 30 and accompanying text.
    \item \textsuperscript{223} See Hogue, \textit{supra} note 9, at CRS-5.
    \item \textsuperscript{224} Rappaport, \textit{supra} note 23, at 1515.
    \item \textsuperscript{225} See 5 U.S.C. § 3345(a)(1),(3); see also \textit{supra} note 210 and accompanying text for a description of the new third category.
\end{itemize}
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their tenuous appointments.

Finally, recess appointments are grounded in the U.S. Constitution and rest soundly on a long-accepted practice, which does not have the same potential for manipulation that acting appointments have, as demonstrated in the Lee case. According to a Senate report in 1998, of the 320 positions in Cabinet-level departments that were subject to Senate confirmation, eighteen percent were being filled in violation of the Vacancies Act. Had Clinton issued a recess appointment to Lee initially in December 1997, he might have inspired greater anger among opposing Senators. Nonetheless, such a recess appointment would have had the benefits of avoiding the controversy surrounding the acting appointment and would have ensured that Lee serve with certainty at least through the end of 1998.

B. The Recess Appointment of Judge Charles Pickering

The case of Judge Charles Pickering further demonstrates that broad recess appointment power does not jeopardize the Senate’s advice and consent role and is superior to other appointment alternatives, such as the narrow recess appointment power supported by Professors Rappaport, Carrier, and Mayton. On May 25, 2001, President Bush nominated U.S. District Court Judge Charles W. Pickering, Sr. to be a judge on the U.S. Court of Appeals for the Fifth Circuit. While extensive Senate Judiciary Committee hearings took place, liberal advocacy groups portrayed Pickering as highly insensitive to racial justice. In March 2002, the Democrat-controlled Committee rejected Pickering’s confirmation along party lines, ten to nine, and refused to send the nomination to the full Senate as President Bush requested.

Republican Senator Hatch lamented the defeat and angrily complained that Pickering had been subjected to “an ugly smear campaign.” Within one year, however, Bush renominated Pickering to the same position, now with a Republican-controlled Senate and Senate Judiciary Committee in support. In October 2003, the Committee voted along party lines to send the nomination to


229. Id.

230. Id.

the full Senate. Senate Democrats, however, were able to obtain the necessary forty-one votes to filibuster a full Senate vote on Pickering; the fifty-one Senate Republicans convinced only three Democrats to join them, falling six votes shy of achieving the sixty vote majority required to break a filibuster.

Defeated for the second time, President Bush appointed Pickering to the Fifth Circuit during a Senate recess on January 16, 2004. Only the second judicial recess appointment in more than twenty years, Pickering's appointment was particularly insulting to Senate Democrats. Democratic Senate Minority Leader Tom Daschle said the appointment showed that Bush "has no interest in working in a bipartisan manner to appoint moderate judges who will uphold the law," while Democratic Senator Patrick Leahy called it a "cynical, divisive appointment that will further politicize the federal judiciary." In contrast, Bush explained that he had been forced to issue Pickering a recess appointment because "a minority of Democratic senators has been using unprecedented obstructionist tactics to prevent [Pickering] and other qualified individuals from receiving up-or-down votes. Their tactics are inconsistent with the Senate's constitutional responsibility and are hurting our judicial system." In December 2004, after one year on the Fifth Circuit, Pickering retired from the federal judiciary and announced that he would not seek a new nomination to a permanent position on the court. In his farewell statement, Pickering expressed concern for the current appointment process: "The mean-spiritedness and lack of civility reduces the pool of nominees willing to offer themselves for service on the bench."

Similar to the Lee appointment dispute, the Pickering case presents a larger question: do the benefits of recess appointments that arguably circumvent strong Senate opposition outweigh the costs to the appointments process? Just as in the Lee example, the answer is yes for three reasons. First, in neither case was the Senate's advice and consent role undermined by the appointment. The Senate Judiciary Committee in the Lee case refused on three occasions to send the nomination to the full Senate for an up-or-down vote. In the Pickering case, the Committee also initially refused to send the nomination


235. Clinton's recess appointment of Judge Roger Gregory to the U.S. Court of Appeals for the Fourth Circuit in 2001 was the other. See Hogue, supra note 9, at CRS-6.


to a full Senate vote. When the nomination did come before the full Senate on the second nomination, a Democratic filibuster prevented a vote. In each of these instances, the inability of the Senate to come to a decision prolonged the vacancy and prevented resolution of the President’s nomination. The President did not undermine the Senate’s advice and consent power; the Senate did.

The Senate alone has the ability to change its committee voting and filibuster rules if it sees fit. Accordingly, if its inability to come to an up-or-down vote leads to a recess appointment, the President should not be accused of circumventing the Senate. Furthermore, it is not clear that the full Senate would have rejected Lee and Pickering; both had a chance of being confirmed if voted upon. The Republican-controlled Senate in 2003 surely would have confirmed Pickering if not for the Democrat filibuster. The Republican-controlled Senate in 1998 and 1999 might have been reluctant to reject Lee if Senator Hatch had allowed it to consider the culturally and politically sensitive nomination.

Second, in both cases, temporary appointments demonstrated their value in bringing resolution to an intransigent appointment process. One might argue that in such bitter disputes, the President should withdraw his nominee and nominate a more moderate candidate. Admittedly, such a process would likely lead to a faster Senate vote and confirmation. However, the purpose of the appointment process from the standpoint of the President has never been to most efficiently fill the vacancy; it has justifiably been to fill the vacancy with the person he believes is the best candidate. Pursuit of this end has led to lengthier and more bitter appointment disputes, arguably reaching its zenith during the Bush administration.

239. Douglas W. Kmiec and Senator John Cornyn, respectively, have argued for reform of the rule that only a favorable Senate committee vote can lead to a full Senate vote and for reform of the filibuster. See Kmiec & Mineberg, supra note 204, at 239; John Cornyn, Our Broken Judicial Confirmation Process and the Need for Filibuster Reform, 27 HARV. J.L. & PUB. POL’Y 181 (2003).


241. See 3 Op. Att’y Gen. at 676; 12 Op. Att’y Gen. at 36-37, 41-42 (in which U.S. Attorneys General Legare and Stanberry argue that the appointment process is primarily an Article II power under which the President initiates the nomination and ultimately decides whether to grant the appointment after Senate confirmation).

often the only remedy to ensure that vacancies are filled and that the government can run effectively.

Moreover, in the Lee and Pickering cases, there is no evidence that either man presented the harm to their posts that opposing Senators predicted. Lee served as assistant attorney general for over three years without direct congressional investigation or opposition from a Republican-controlled Congress. Pickering decided cases without controversy on the Fifth Circuit before retiring. Although recess appointments anger those Senators in opposition, they are a necessary alternative to provide leadership and stability to government, if only for a single year.

Finally, broad recess appointment power is superior to a narrow interpretation because it better ensures the smooth functioning of government. Broad recess appointment power enables presidents to fill more vacancies—filling those that occurred during a Senate session, making appointments during intrasession recesses, and making appointments of federal judges. Furthermore, these appointments will last longer than one year if made during an intrasession recess, arguably increasing the stability and effectiveness of the appointment. These qualities are especially important to combat the number and length of vacancies caused by today's antagonistic appointments process. While the precise benefit of recess appointments to the smooth functioning of the executive branch is difficult to measure, examining the case of the federal judiciary is instructive.

The federal judiciary has long been plagued by a vacancies problem. In 1985, Former Chief Justice Warren Burger expressed concern about the number of judicial vacancies, noting that "[f]ederal judges are working longer hours and more days than ever before but, like Alice in Wonderland, they cannot run fast enough even to stay in the same place [and] . . . I have urged the President and the Senate to speed up the process" of filling judicial vacancies.243 In 1992, in a Federal Judicial Center survey, more than sixty-one percent of the federal judges participating rated delay in filling judicial vacancies as a "grave" or a "large" problem. There was no problem on the survey that received more concern.244 Then-Chief Justice Rehnquist agreed that "[t]here is perhaps no issue more important to the judiciary right now than this serious judicial vacancy problem."245 In 1997, Rehnquist urged further that "the President should nominate candidates with reasonable promptness, and the Senate should act within a reasonable time to confirm or reject them. . . . The

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244. Jeffrey A. Hennemuth & A. Fletcher Mangum, Judicial Vacancies: An Examination of the Problem and Possible Solutions, 14 Miss. C. L. REV. 319, 319 (1994).
Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.\(^\text{246}\) President Bush similarly remarked in 2002 that refusing to grant Pickering a vote by the full Senate "leaves another empty seat in the federal judiciary at a time when we face a vacancy crisis."\(^\text{247}\)

One of the reasons behind the federal judiciary’s vacancy problem is that the recess appointment power has not been used to offset the hostile and inefficient judicial appointment process. During the Clinton Administration, a Republican-controlled Senate rejected by vote or procedure 114 of President Clinton’s judicial nominees.\(^\text{248}\) Although President Bush has had the support of a Republican-controlled Senate for most of his presidency, the Pickering dispute demonstrates the power of the filibuster in preventing a vote on nominees. Despite this conflict, only three federal judges have been recess appointed in more than twenty years, and only four since 1960.\(^\text{249}\) Prior to 1960, approximately 300 Article III judges were recess appointed.\(^\text{250}\) The presidential decision not to recess appoint judges is perhaps politically wise considering the Senate’s passionate opposition to such a practice. However, it seems clear that the lack of judicial recess appointments has left vacancies open to the detriment of the smooth and effective functioning of the judiciary.

Professors Rappaport, Carrier, and Mayton would likely respond that despite the benefits of broad recess appointment power, the text and structure of the Recess Appointments Clause support a narrow presidential power. As to the text, even these three scholars admit ambiguity.\(^\text{251}\) As to structure, this Part has suggested that even in the most bitter appointment disputes, the Senate’s advice and consent power remains intact, and can still be used as a powerful threat against the President. Furthermore, this Part has shown that the purpose of the Clause—the smooth functioning of government—provides the greatest support for a broad recess appointment power. A long line of U.S. attorneys general and federal judges has recognized the value of the recess appointment power precisely because it serves this vital purpose without raising sufficiently grave structural constitutional concerns.

### CONCLUSION

The Recess Appointments Clause has generated conflict between the Senate and the President since the early years of the Republic. In recent years,

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249. See Halstead, supra note 36, at CRS-17; Hogue, supra note 9, at CRS-6.
251. See Rappaport, supra note 23, at 1502; Carrier, supra note 10, at 2217 n.72; Mayton, supra note 22, at 526.
controversial Bush Administration recess appointments have reinvigorated academic interest in the Clause. Scholars have focused their analysis on whether the current presidential recess appointment practice is constitutional. In particular, they have investigated whether the Constitutional Framers intended to give the President power to make recess appointments (1) to fill vacancies that occurred during the Senate session, (2) during intrasession recesses, and (3) of Article III judges. None of these scholars, however, has examined an equally intriguing question: why have all three branches long accepted the constitutionality of broad presidential recess appointment power?

While each branch of the American government has accepted the constitutionality of broad recess appointment powers for slightly different reasons, all three have functionally agreed to permit the political branches to resolve the conflict. First, the executive branch has long concluded that the purpose of the Clause—to ensure the smooth and effective functioning of government—demands that the President exercise broad power. The executive branch has also emphasized that Article II uniquely vests the President with power to execute the laws and control the appointments process, while the Senate's powers provide a sufficient safeguard against potential presidential abuse.

In contrast to the executive branch, the legislative branch is not directly benefited by accepting broad presidential powers. Nonetheless, it has never directly challenged the constitutionality of the President’s broad recess appointment power, either through litigation or legislation. Instead, the legislative branch has decided that it is more effective to oppose the practice within the political arena. Specifically, Congress has used its appropriations power to limit appointee payment through legislation, while the Senate has used its advice and consent power to refuse to confirm future appointees. Both of these methods have been far more successful at constraining the President’s discretionary authority than direct attempts at challenging the President’s power through litigation or legislation likely would have been.

Finally, the judicial branch’s decision to uphold the constitutionality of broad presidential recess appointment power can perhaps best be viewed as a practical synthesis of the executive and legislative branch reactions to the Clause. Relying on the unbroken executive practice and legislative acquiescence, the judiciary has found that an otherwise ambiguous constitutional text has long been trumped by political agreement. By finding broad executive power constitutional, the judiciary has chosen not to determine the limits of the President’s discretionary authority. Rather, it has justifiably left that question to the political battlefield, for the Senate and President—both armed with significant constitutional powers—to debate and resolve for themselves.

The bitter disputes surrounding the acting appointment of Bill Lann Lee and recess appointment of Judge Charles Pickering provide support for the
broad recess appointment power that the three branches have agreed to. Despite the hostility generated between the President and Senate opposition, these case studies demonstrate that broad recess appointment power best ensures the smooth functioning of government while not jeopardizing the Senate's advice and consent role. More generally, these case studies support the conclusion that if adequately checked by the powers of the other branches, the threat of potential abuse by one branch should be accepted to promote effective government.

Ultimately, the three branches have chosen this course, resolving the controversy over the Recess Appointments Clause by agreeing to a functional, rather than a formal balancing of governmental powers. As James Madison wrote in Federalist No. 51, Justices Frankfurter and Jackson concurred in Youngstown Sheet & Tube Co. v. Sawyer, and Justice Rehnquist held in Goldwater v. Carter, guaranteeing the separation of powers does not require a rigid division of authority among the three branches. On the contrary, relying upon the political checks and balances provided for in the Constitution best ensures that the branches work together to promote effective government on the one hand, and to protect against tyranny by any one branch on the other.