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# THE LEAST VULNERABLE BRANCH: ENSURING THE CONTINUITY OF THE SUPREME COURT

*Randolph Moss<sup>+</sup> and Edward Siskel<sup>++</sup>*

On March 13, 2002, just six months after the September 11 terrorist attacks on New York City and Washington, D.C., Justice Anthony Kennedy testified at a House subcommittee hearing on contingency planning for the federal government in the aftermath of a terrorist attack.<sup>1</sup> In assessing whether members of the judiciary should be sequestered in an undisclosed location as part of the “shadow government” along with representatives of the other branches, Justice Kennedy stated: “We wonder about the necessity [of being part of the shadow government]. All . . . district and circuit judges are courts of general jurisdiction and can issue writs under the All Writs Act. So we are already dispersed nationwide.”<sup>2</sup> During a hearing of the Continuity of Government Commission held on September 23, 2002, Judge Robert Katzmann echoed Justice Kennedy’s comments, stating that “[t]he Federal judiciary, unlike the other branches of government, is dispersed across the nation and so it does not confront the same kinds of issues that this Commission will consider with respect to the other branches.”<sup>3</sup> Justice Kennedy’s and Judge Katzmann’s assessments of the Supreme Court’s vulnerability in a post-9/11 world are typical of the general attitude toward the Court in the continuity of government discussion thus far. In the conversation after September 11 about ensuring the continued functioning of our political institutions during a national emergency, the Supreme Court has often been treated as the least vulnerable of the three branches of government.

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1. Charles Lane, *After September 11<sup>th</sup>, Judiciary Rethinks the Unthinkable*, WASH. POST, Apr. 12, 2002, at A29.

2. *Id.*

3. *The Continuity of Government Commission*, 2002 CONTINUITY GOV’T COMMISSION PROC., available at <http://www.continuityofgovernment.org/pdfs/020923transcript.pdf> (Sept. 23, 2002) [hereinafter *Continuity Commission*]. Judge Katzmann noted, “it is worth considering the consequences of an attack on the Supreme Court even if at the end of the day we were to conclude that present arrangements serve us . . . better than the other alternatives.” *Id.*

While there are clear reasons why we might be less concerned about the Supreme Court, some of which were mentioned by Justice Kennedy and Judge Katzmann, and others which will be discussed below, it is not self-evident that the Supreme Court and the federal judiciary can readily weather a crisis of the sort that we must now contemplate after September 11.<sup>4</sup> Although federal courts are dispersed nationwide and power within the judiciary is decentralized, the full force and uniformity of federal law depends on the continued functioning of the Supreme Court. The absence of the Supreme Court at a time of national crisis—though not necessarily debilitating to the federal judiciary—could exacerbate the crisis. The question becomes: Do we need to worry about the continuity of the Supreme Court? This article answers that question with a measured yes, and then analyzes possible solutions to the problem both in terms of their constitutionality and their soundness as a matter of public policy.

Part I of this article raises the question of whether there is a continuity problem for the Supreme Court at all. Although the death or incapacity of four or more Supreme Court Justices would leave the Court without the quorum necessary to hear and decide cases, the Constitution already provides mechanisms for filling vacancies on the Court—the Appointments Clause and (at least as a matter of historic practice) the Recess Appointments Clause.<sup>5</sup> These mechanisms have served us well for over two hundred years, providing relatively smooth transitions as vacancies on the Court have opened and filled.<sup>6</sup> Moreover, history has shown that many controversial cases—including some that involve executive and legislative responses to national crises—took many months, if not years, to reach the Supreme Court. In most of these cases, there is no evidence that the delay in reaching a final resolution, as the issue wound its way through the lower courts, created or exacerbated a constitutional crisis. In fact, there have been times in the Court's history when it was unable to convene for lack of a quorum or for other reasons and the country did not descend into chaos because of the absence of the Court.<sup>7</sup> Thus, even if the appointment process is time consuming, we

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4. *Id.*

5. U.S. CONST. art. II, § 2, cls. 2-3.

6. See Thomas A. Curtis, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretations*, 84 COLUM. L. REV. 1758, 1773-90 (1984).

7. See *Continuity Commission*, *supra* note 3 (“[I]n 1811, the Court did not sit for an entire year because there was no quorum. And in 1866 and 1867, there was almost a period of two years where the Court did not sit . . . we’ve survived it.”).

may have more time than we think to fill vacancies on the Court before the absence of a quorum has any lasting negative impact.

Nevertheless, it is likely that a terrorist attack of the magnitude that we are contemplating (i.e., one that would require a plan for the continuity of the three branches of the federal government), and our response to that attack, would present constitutional and statutory questions of a different order and immediacy than anything the courts have faced thus far in our Nation's history. If cases addressing these questions were working their way through the courts at a time when the Supreme Court was unable to exercise its constitutional function, the cost to the legitimacy of the government's actions and the risk to individual liberties could be enormous.

Therefore, Part I concludes that there is, in fact, cause for concern about the continuity of the Supreme Court during such a catastrophic event, and the problem is sufficiently serious that we should address it now, before a period of crisis. We are nevertheless aware that the crisis we imagine and seek to avoid is contingent on a confluence of events that are unlikely to occur all at once. The remainder of our analysis, therefore, maintains a healthy skepticism towards designing a solution to a problem that may exist only in the highly unlikely event of a worst case scenario.

Part II describes the nature of the problems that could arise in the aftermath of a terrorist attack resulting in the death or incapacitation of several Justices. The problem of continuity of the Supreme Court depends in large part on the impact of the attack on the other branches of government. Because the appointment of replacement Justices requires the advice and consent of the Senate, whether those vacancies can be filled without significant delay depends on whether a quorum exists in the Senate.<sup>8</sup> Similarly, the authority of newly appointed Justices might depend on the legitimacy of the nominating acting-President's claim to that office. However, aside from the various permutations regarding the state of the other branches, the core problem remains the same: how to resolve the tension between restoring the Supreme Court to a quorum quickly, while at the same time preserving its legitimacy.

In Part III, we consider the various solutions that have been proposed for ensuring the continuity of the Court in a time of crisis. Among those proposals are: (1) imposing a time limit on the Senate's advice and consent; (2) requiring the President to consult with the Senate before making any recess appointments and/or requiring some ideological balance among the recess appointees; (3) lowering the Court's quorum

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8. *Continuity Commission, supra* note 3.

requirement; (4) designating certain offices in advance to fill vacancies on the Court; and (5) creating an intermediate court between the courts of appeals and the Supreme Court to resolve disputes between the circuits and provide a higher authority on questions of extreme national importance. We consider whether these various proposals could be enacted by statute or would require a constitutional amendment. We also evaluate whether the various proposals successfully resolve the tension between timely restoration and legitimacy.

Finally, in Part IV, we choose among these options and recommend that Congress pass a statute creating an intermediate court drawn from any remaining Justices and the chief judges of the courts of appeals. This court would convene in times of national emergency when the Supreme Court lacks a quorum as a result of that emergency, and it would exercise limited discretionary jurisdiction over appeals from the courts of appeals and state supreme courts in cases of immediate, national importance. We believe creating an intermediate court with limited jurisdiction would not require a constitutional amendment because Congress has the power to create inferior courts<sup>9</sup> and, at least prospectively, the nomination and confirmation of a court of appeals judge would encompass that judge's potential service on this emergency court. As for sitting judges, we believe they could also serve on the court without violating the Appointments Clause because Congress has the authority to expand the duties of an officer so long as the new duties are "germane" to those that the officer exercised originally.<sup>10</sup> Ultimately, we conclude that this option provides the best balance between a smooth, immediate transition, and a decisionmaker that would have much, if not all, of the legitimacy of the Supreme Court.

Justice Kennedy and Judge Katzmann are certainly right that the distribution of federal courts throughout the country, combined with the power delegated to judges at each level of the judiciary, ensures that courts will be available to resolve the vast majority of disputes in the aftermath of an attack. But a continuity plan for the Court is necessary for that small category of highly controversial cases involving challenges to our constitutional framework and individual liberties during a national emergency, in which the need for a functioning and authoritative Supreme Court is most pronounced.

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9. U.S. CONST. art I, § 8, cl. 9.

10. *Shoemaker v. United States*, 147 U.S. 282, 301 (1893).

## I. DO WE NEED TO WORRY ABOUT THE CONTINUITY OF THE SUPREME COURT?

Unlike Congress, the Supreme Court is not constitutionally required to have a quorum to act.<sup>11</sup> In fact, the Constitution says nothing about the size of the Court.<sup>12</sup> Since 1948, however, the Supreme Court by statute must have a quorum of at least six Justices who are able to hear and rule on a case before it may exercise jurisdiction.<sup>13</sup> Although the Court has followed the “Rule of Four” in granting petitions for writ of certiorari since at least 1925,<sup>14</sup> and only five votes are necessary for an opinion of the Court, without a quorum of six, the Court cannot convene to vote on certiorari petitions or hear and decide cases. In the absence of a quorum, the remaining Justices must determine whether “the case cannot be heard and determined at the next ensuing term.”<sup>15</sup> If a majority of these Justices find that this will not be possible, then “the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.”<sup>16</sup> In other words, the judgment is affirmed but the act of affirmance has no precedential effect.

In the aftermath of a large-scale terrorist attack on Washington, D.C. similar to the attacks of September 11, it is certainly possible that four or more Supreme Court Justices might be killed or incapacitated, thereby leaving the Court without a quorum.<sup>17</sup> In this situation, the Court would not be able to vote on certiorari petitions, hear cases, or issue opinions

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11. See U.S. CONST. art. III.

12. See *id.*

13. 28 U.S.C. § 1 (2000).

14. See John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 10 (1983); see also Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 975-76 (1957).

15. 28 U.S.C. § 2109 (2000).

16. *Id.* Section 2109 also provides that if the case is on direct appeal from a district court, the Chief Justice:

may order it remitted to the court of appeals for the circuit including the district court in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct.

*Id.*

17. See Nick Fielding, *Masterminds of 9/11 Reveal Terror Secrets*, SUNDAY TIMES (London), Sept. 8, 2002, at 1 (stating that on September 11, the fourth plane that crashed in Pennsylvania was heading for the Capitol building). Given the proximity of the Supreme Court building, it is not difficult to imagine the Court being targeted as well. See Lane, *supra* note 1 (stating that only two of the Justices were in the building on the morning of September 11).

until a quorum was restored.<sup>18</sup> Cases could be held over until the next term or they could be affirmed without precedential effect, but the Court could not resolve them until enough vacancies were filled.<sup>19</sup>

The means for the President to fill vacancies on the Court and restore a quorum are specified in the Appointments Clause of the Constitution.<sup>20</sup> Article II, Section 2 provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.”<sup>21</sup> If a terrorist attack left the Court without a quorum, the President could use his appointment power to nominate replacements and, together with the Senate, restore a quorum to the Court. This assumes, however, that there is a President to make nominations and a Senate that can provide “Advice and Consent” on those nominees.<sup>22</sup>

In a large-scale attack on Washington, D.C. that could render the Court without a quorum, it is also possible that a large number of senators could be killed or incapacitated as well. The Seventeenth Amendment already provides a mechanism for the speedy replacement of senators through temporary appointments by the governor of the senator’s home state,<sup>23</sup> but the process of restoring a quorum to the

18. *Continuity Commission*, *supra* note 3; see also 28 U.S.C. § 1 (setting the quorum of the Court).

19. *Continuity Commission*, *supra* note 3.

20. U.S. CONST. art. II, § 2, cl. 2.

21. *Id.*

22. *Id.*

23. *Id.* amend. XVII, cl. 2. The Seventeenth Amendment states:

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

*Id.* Forty-six states have authorized their governors to make temporary appointments pursuant to the Seventeenth Amendment (only Massachusetts, Oklahoma, Oregon, and Wisconsin have declined to do so). See Act of July 31, 2004, ch. 236, 2004 Mass. Acts, <http://www.mass.gov/legis/laws/seslaw04/sl040236.htm>; OKLA. STAT. ANN. tit. 26, § 12-101(a); OR. REV. STAT. § 188.120 (2001); WIS. STAT. ANN. § 17.18 (West 2003); SULA P. RICHARDSON & THOMAS H. NEALE, CONG. RESEARCH SERV., HOUSE AND SENATE VACANCIES: HOW ARE THEY FILLED? 2 (2003), available at <http://www.senate.gov/artandhistory/history/resources/pdf/Vacancies.pdf> (updated Jan. 22, 2003). *But see* Okla. Stat. Ann. tit. 26, § 12-101.B. (West Supp. 2004). Section 12-101(b) states:

No special election shall be called if the vacancy occurs after March 1 of any even-numbered year if the term of the office expires the following year. In such a case, the candidate elected to the office at the regular General Election shall be appointed by the Governor to fill the unexpired term.

*Id.*

Senate may nevertheless take a significant amount of time, particularly in the aftermath of a devastating attack. There also may be some uncertainty and potential litigation about what constitutes a quorum of the Senate.<sup>24</sup> Moreover, the Seventeenth Amendment provides only for immediate appointments to fill *vacancies* in the Senate; it does not address the scenario in which a substantial number of senators are incapacitated.<sup>25</sup> In the case of a biological attack on Washington, D.C. leaving a majority of senators incapacitated, for example, it could take an extended period of time to fill those seats through general elections or resignations (and gubernatorial appointments) where senators ultimately conclude that they will be unable to return to their duties.<sup>26</sup>

Although the possibility of the Senate being without a quorum is cause for concern with regard to filling vacancies throughout the government, the Constitution provides a mechanism for making appointments to most (if not all) offices without the advice and consent of the Senate.<sup>27</sup> In the event that the Senate is unable to convene to provide “Advice and Consent,” the President might temporarily fill vacancies through recess appointments.<sup>28</sup> The Recess Appointments Clause provides: “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”<sup>29</sup> In this way, the President could seek to replace any deceased Justices immediately, regardless of the state of the Senate.<sup>30</sup> The newly appointed Justices would then serve until the end of the Senate’s next session when presumably the federal government will have reached a new equilibrium.<sup>31</sup> Presidents have used the recess appointment power to fill over 300 vacancies on the federal bench, including fifteen recess appointments of Supreme Court Justices.<sup>32</sup>

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24. See U.S. CONST. art. I, § 5, cl. 1. The Constitution states: “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a *Majority of each shall constitute a Quorum to do Business*; but a smaller Number may adjourn from day to day . . .” *Id.* (emphasis added). Both the House and the Senate have interpreted a “majority” to mean a majority of living members, as opposed to a majority of seats. However, this interpretation is subject to challenge and would not address the problem of living but incapacitated members. See *Continuity Commission*, *supra* note 3.

25. See U.S. CONST. amend. XVII, cl. 2.

26. See *id.* art. I, § 3, cl. 2 (describing the general election for U.S. senators).

27. *Id.* art. II, § 2, cl. 3.

28. *Id.*

29. *Id.*

30. See *id.*

31. *Id.*

32. See *Bush Uses Recess Appointments to Put Nominee on Court*, CNN.COM., at <http://us.cnn.com/2004/LAW/02/20/bush.pryor> (last visited Mar. 14, 2004); see also 2 JOAN BISKUPIC & ELDER WITT, *GUIDE TO THE U.S. SUPREME COURT* 861 (3d ed. 1997).



Soon after the Supreme Court was created, George Washington made a recess appointment of John Rutledge as Chief Justice.<sup>33</sup> More recently, President Eisenhower made recess appointments of Chief Justice Warren, Justice Brennan, and Justice Stewart.<sup>34</sup> In each of those cases, except for Chief Justice Rutledge, the Senate took up the nomination of the recess appointee as soon as it reconvened and confirmed the nominee.<sup>35</sup>

On first glance, therefore, it may appear that the Constitution provides an adequate continuity scheme for the Supreme Court. Vacancies may be filled through the normal appointment process, and if the Senate is unable to convene to provide advice and consent, the President may use the recess appointment power. There are, however, significant constitutional questions about using the recess appointment power under these circumstances. For example, there is some debate over whether the Recess Appointments Clause can be read to allow for the recess appointment of Article III judges given the constitutional guarantee of life tenure.<sup>36</sup> The two courts of appeals that have addressed this question have both held that Article III judges can serve as recess appointees.<sup>37</sup> Although the Court of Appeals for the Ninth Circuit originally held that such recess appointments violated the Life Tenure Clause, it then reversed course on rehearing en banc.<sup>38</sup> The Supreme Court has yet to confront the issue, which leaves some uncertainty in relying on recess appointments to restore a quorum to the Court in the aftermath of an attack.<sup>39</sup> In addition, there remains a question as to whether the Senate could even be “in recess” if no official recess was declared before the

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33. STUART BUCK et al., JUDICIAL RECESS APPOINTMENTS: A SURVEY OF THE ARGUMENTS 2, available at <http://www.fed-soc.org/pdf/recapp.pdf> (last visited Apr. 8, 2004); see also LEE EPSTEIN et al., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENT 292 (1994).

34. See EPSTEIN, *supra* note 33. Following President Eisenhower's recess appointments to the Court, the Senate issued a sense-of-the-Senate resolution stating: [T]he making of recess appointments to the Supreme Court, though authorized by the Constitution, is not wholly consistent with the best interests of the Supreme Court, the nominee who may be involved, the litigants before the Court, nor, indeed, the people of the United States, and . . . such appointments, therefore, should be avoided except under most unusual and urgent circumstances.

S. Res. 334, 86th Cong. (1960).

35. See BUCK, *supra* note 33, app. A.

36. *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704, 709 (2d Cir. 1962).

37. *Woodley*, 751 F.2d at 1009; *Allocco*, 305 F.2d at 709.

38. *Woodley*, 751 F.2d at 1009.

39. See S. Res. 334.

attack (and the Senate simply could not convene for lack of a quorum)—although common sense certainly would support the use of the recess appointments power in just such a circumstance.<sup>40</sup>

Moreover, while these two mechanisms for filling vacancies have worked with relatively few glitches for over 200 years, we have never had to deal with a large number of vacancies on the Court at the same time.<sup>41</sup> Although the Court has been unable to hear cases for lack of a quorum on several occasions during the last sixty years, in each of these cases, specific recusals caused the absence of a quorum as opposed to vacancies that would impact the Court's entire docket.<sup>42</sup> More importantly, like the Seventeenth Amendment, the mechanisms in Article II only provide procedures for filling vacancies on the Court; they do not allow the President or Congress to replace Justices who are incapacitated.<sup>43</sup> If four or more Justices were incapacitated temporarily as a result of an attack, for example, the President and Congress would be powerless to restore a quorum.<sup>44</sup> In addition, both the Appointments Clause and the Recess Appointments Clause require a sitting President to initiate the process either through nomination or recess appointment.<sup>45</sup> If the status of an acting President were uncertain, or if the President were unable or unwilling to initiate the process, no other mechanism exists in the Constitution for filling vacancies on the Court.

Given the existing constitutional framework, a number of other potential problems are apparent. First, delays might arise in filling vacancies due to questions about Presidential succession or the absence of a quorum in the Senate.<sup>46</sup> Second, even if no continuity issues arise with the other branches, the President—faced with an array of crises—

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40. Executive Power-Recess Appointments, 33 Op. Att'y Gen 20, 21-25 (1921); see also COMM. ON THE JUDICIARY, "RECESS OF THE SENATE," ETC., S. REP. NO. 58-4389, at 2 (1905).

41. See *Continuity Commission*, supra note 3.

42. See *Arizona v. United States* Dist. Court, 459 U.S. 1191 (1983), *aff'd for absence of a quorum*, 688 F.2d 1297 (9th Cir. 1982); *Arizona v. Ash Grove Cement Co.*, 459 U.S. 1191 (1983), *aff'd for absence of a quorum*, 673 F.2d 1020 (9th Cir. 1982); *Sloan v. Nixon*, 419 U.S. 958 (1974), *aff'd for absence of a quorum*, 493 F.2d 1398 (2d Cir. 1974); *Prichard v. United States*, 339 U.S. 974 (1950), *aff'd for absence of a quorum*, 181 F.2d 326 (6th Cir. 1950); *United States v. Aluminum Co. of Am.*, 322 U.S. 716 (1944), *certifying questions to* 148 F.2d 416 (2d Cir. 1945).

43. See generally David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000) (discussing the problem of incapacitated Justices).

44. See *Continuity Commission*, supra note 3.

45. U.S. CONST. art II, § 2, cls. 2-3.

46. See CONTINUITY OF GOV'T COMM'N, THE CONGRESS 11-12 (May 2003), available at <http://www.continuityofgovernment.org/pdfs/FirstReport.pdf>.

might delay compiling a list of candidates to fill multiple vacancies and, for similar reasons, the confirmation process might drag on for months. Third, assuming none of these difficulties occurs, there is still the problem of a single President appointing a majority of the Justices at a single time, when there might exist a particular need for the judiciary to act as a check on executive responses to a national crisis, or possibly making recess appointments of a majority of Justices without any input from the Senate.<sup>47</sup> The question then becomes whether these scenarios are sufficiently likely to occur and whether the consequences are sufficiently severe that we ought to reevaluate that framework now.

Despite these potential difficulties, a number of factors caution against meddling with the structure created by the Framers that has served our country so well for over 200 years. As Justice Kennedy's and Judge Katzmann's remarks suggest, unlike the other branches of government, the federal judiciary is widely dispersed and its powers are highly decentralized.<sup>48</sup> If the Supreme Court could not function for lack of a quorum, federal courts throughout the country would still be able to decide cases and order necessary relief.<sup>49</sup> For example, the All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."<sup>50</sup> Furthermore, as explained above, a statutory framework already exists for dealing with cases when the Supreme Court does not have a quorum—the decision of the court of appeals or the state supreme court would be affirmed, albeit without precedential effect.<sup>51</sup> Many cases are, in relevant respects, similarly resolved as a matter of course because the Supreme Court's docket is, with only rare exception, discretionary.<sup>52</sup> There are thousands of cases each year in which the court of appeals or the state supreme court provides the final word in the matter.<sup>53</sup> In a sense, therefore, there is already a contingency plan in place for continuity of the Supreme Court.

In addition, the history of the Supreme Court shows that in many cases where there has been a national crisis that has resulted in litigation (either suits challenging the constitutionality of government action in responding to the crisis or questions of statutory interpretation that arise

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47. Executive Power-Recess Appointments, *supra* note 40, at 21.

48. See *supra* text accompanying notes 1-3.

49. 28 U.S.C. § 1651 (2000).

50. *Id.* § 1651(a).

51. *Id.* §§ 1651, 2109.

52. See Stevens, *supra* note 14, at 10-11.

53. See *Continuity Commission*, *supra* note 3.

in connection with the crisis), a substantial amount of time has elapsed while the cases wind through the lower courts to the Supreme Court. The most recent example of this is the post-September 11 cases involving the detention and prosecution of “enemy combatants.” On November 10, 2003, the Court granted certiorari to hear the cases of several detainees of Guantanamo Bay who challenged the government’s right to detain them without access to U.S. courts,<sup>54</sup> and the Court heard oral argument in these cases on April 20, 2004.<sup>55</sup> The decision to grant certiorari in these cases came nearly two years after the September 11 attacks and approximately eighteen months after the appellants were detained in Afghanistan and transported to Guantanamo Bay.<sup>56</sup> Similarly, the Court heard argument in *Korematsu v. United States*<sup>57</sup> on October 11 and 12, 1944—over two and a half years after President Roosevelt issued the executive orders authorizing the Japanese internment.<sup>58</sup> While the delay in resolving these issues of civil liberties is unfortunate, it is significant that the Supreme Court is often a latecomer in dealing with national crises.

Not only is there often substantial delay before cases reach the Court, but there have been times in the Supreme Court’s history when it has been unable to convene—in a few circumstances even for an entire Term—and there is no evidence that the absence of the Court either created a constitutional crisis or further exacerbated an existing crisis. In 1802, for example, the Court did not meet for fourteen months because Congress had cancelled the June and December Terms of Court.<sup>59</sup> During that time, the Court was unable to hear and decide *Marbury v. Madison*,<sup>60</sup> which represented a pressing issue even if limited to a case about the validity of the midnight judges’ commissions.<sup>61</sup> In 1811, the Court was forced to cancel the entire Term of Court for lack of a

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54. *Rasul v. Bush*, 124 S. Ct. 534 (2003) (mem.).

55. *See Rasul v. Bush*, 124 S. Ct. 2686, 2686 (2003).

56. *See Rasul v. Bush*, 124 S. Ct. 534 (2003) (mem.). Additionally, the Court granted certiorari in *Hamdi v. Rumsfeld*, approximately twenty-seven months after Hamdi’s capture and detention. 316 F.3d 450, 460 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004). The Court granted certiorari in *Padilla v. Rumsfeld* approximately twenty-seven months after Padilla’s arrest. 352 F.3d 695, 699 (2nd Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004).

57. 323 U.S. 214 (1944).

58. *See id.* at 226 (Roberts, J., dissenting); *see also Hirabayashi v. United States*, 320 U.S. 81, 85 (1943). *Hirabayashi* was heard over a year after the relevant action was taken. *Id.*

59. Act of Apr. 29, 1802, ch. 31, § 3, 2 Stat. 156, 157.

60. 5 U.S. (1 Cranch) 137 (1803).

61. *Id.* at 138.

quorum.<sup>62</sup> During that time, the Court held over deciding several cases—such as *United States v. Hudson & Goodwin*<sup>63</sup> and *M'Kim v. Voorhies*<sup>64</sup>—until a quorum was restored for the 1812 Term.<sup>65</sup>

Together these factors suggest that the judiciary is, indeed, the least vulnerable branch and that we may not need to worry about the continuity of the Court. The geographic distribution of federal courts combined with the dispersion of judicial power certainly provides reassurance that an attack on Washington, D.C. could not disable the judicial branch as a whole. In addition, historical experience suggests that the country can weather delays in receiving final judgment from the Supreme Court even on questions of national importance.

Nonetheless, the circumstances surrounding a catastrophic attack on Washington, D.C. and its aftermath could present unique challenges and stresses on our constitutional framework that need to be addressed immediately. During a state of national emergency, particularly if a substantial segment of the federal government is disabled, constitutional questions will likely arise that are of a different order than those addressed in the usual course. A greater likelihood exists that during this type of crisis, constitutional issues will arise that must be addressed promptly and conclusively for fear of further damaging the stability and security of the federal government. For example, in the type of nightmare scenario that could result in the death of the President, Vice President, members of the Cabinet, and members of Congress, serious questions about Presidential succession requiring immediate and conclusive resolution might well arise. Similarly, if a large-scale biological, chemical, or nuclear attack caused the executive branch to resort to extreme measures, such as using the military to maintain order

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62. See JEAN EDWARD SMITH, JOHN MARSHALL 399-400 (1996). The Court was made up of seven Justices at the time, and under the Judiciary Act of 1801, had a quorum requirement of four. *Id.* at 400. After Justice Cushing passed away in 1810, the Court was left with six Justices. See *id.* at 399-400. Justice Chase was too ill to attend the Court and Justices Johnson and Todd failed to return to Washington from riding circuit in time for the beginning of the Term, leaving the Court without a quorum. *Id.* at 400. President Madison had a great deal of difficulty filling Justice Cushing's seat. See *id.* His first three nominees were either rejected by the Senate (Alexander Wolcott) or declined to serve after being confirmed (Levi Lincoln and John Quincy Adams). *Id.* at 399-400. Eventually Justice Story was confirmed and accepted Justice Cushing's seat; Justice Duvall replaced Justice Chase, and a quorum was restored for the 1812 Term. *Id.* at 401.

63. 11 U.S. (Cranch) 32 (1812) (concerning federal court common law jurisdiction over criminal cases).

64. 11 U.S. (Cranch) 279 (1812) (concerning state court jurisdiction to enjoin a judgment of the circuit court of the United States).

65. *Hudson & Goodwin*, 11 U.S. at 32; see also *M'Kim*, 11 U.S. at 281.

in part of the country or quarantining part of the population, prompt and final judicial resolution might prove critical.

In fact, there are numerous examples in the Nation's history when the Supreme Court has been called upon to resolve an issue of profound national importance on an expedited schedule. During World War II, when eight German saboteurs were captured on American soil and tried by military commission (six were sentenced to death), the Court convened a special Term within weeks of the conclusion of their trial to hear a challenge to the jurisdiction of the military tribunal.<sup>66</sup> After President Truman seized the Nation's steel mills to prevent a strike by steelworkers from interfering with the Korean War effort, the Supreme Court heard a challenge to that action just over a month after the Executive order was issued.<sup>67</sup> The Pentagon Papers case was heard and decided within five days of the government's attempt to enjoin publication.<sup>68</sup> Most recently, the Supreme Court addressed the dispute over the 2000 Presidential election twice in less than two months.<sup>69</sup> Moreover, in the vast majority of significant cases that took an extended period to find their way to the Supreme Court in the past, the Court was still in place during that process, waiting its turn and lending its legitimacy to the federal judiciary.<sup>70</sup> After a terrorist attack, however, if uncertainty exists concerning the Supreme Court's ability ultimately to review the decision of the lower courts, the force of any orders from the lower courts might be undermined.<sup>71</sup>

The current mechanism for resolving cases when the Supreme Court lacks a quorum may also produce a worst case scenario during times of national crisis.<sup>72</sup> Under 28 U.S.C. § 2109, the lack of a quorum leads to affirmance of the decision of the lower court without precedential effect, making it possible that unsatisfied litigants will pursue their claims in another circuit or in multiple venues.<sup>73</sup> As a result, the current system

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66. *Ex parte Quirin*, 317 U.S. 1, 18-19 (1942). The Court announced its decision from the bench on the day oral argument concluded, although it did not file a formal opinion until three months later. *Id.* at 20. We express no opinion on whether it was prudent for the Court to issue a decision without first testing its conclusions through the opinion-writing process.

67. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-84 (1952).

68. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

69. *Bush v. Gore*, 531 U.S. 98, 100 (2000).

70. *See Continuity Commission*, *supra* note 3.

71. *Id.*

72. *Id.*

73. 28 U.S.C. § 2109 (2000).

may also produce conflicting decisions from different circuits without a final arbiter in place able to resolve the conflict.<sup>74</sup>

Finally, even if a quorum could be restored in time to resolve these important issues, either through recess appointments or quick confirmations, there may still be a question of the Court's legitimacy in the eyes of the public.<sup>75</sup> If all or most of the Justices were appointed by the same President at a time when the Senate was either unable or reluctant to exercise its authority to give advice and consent, the public might well perceive the Court as a tool of the executive branch or as inadequately vetted.<sup>76</sup> At a time when the need for checks and balances by a coequal branch may be most pronounced, the country cannot afford the perception that the Court is not exercising rigorous, independent judicial review.<sup>77</sup>

## II. WHAT IS THE NATURE OF THE PROBLEM WITH THE CONTINUITY OF THE SUPREME COURT?

Assuming the current constitutional and statutory framework is inadequate to provide needed continuity in the aftermath of an attack resulting in the death or incapacitation of four or more Supreme Court Justices, we need to clarify the nature of the problem so that we can identify and evaluate possible solutions. As discussed above, the scope of the problem depends on the impact of the attack on the other branches of government. If the Senate cannot convene, the President's ability to fill vacancies on the Court through the standard appointment process will be delayed. If the Senate cannot convene because a majority of senators are incapacitated, additional problems for the appointment of Justices might arise. Similarly, if the line of Presidential succession has reached the point of a minor Cabinet officer, or if there were competing claims on Presidential succession, then the legitimacy of any appointments to the Court will be undermined in the eyes of the public.

Setting aside these variables, however, a core problem exists in all the doomsday scenarios. The challenge is essentially how to reconcile two equally important, but often conflicting, goals: restoring the Court to a quorum as quickly as possible, while at the same time preserving its legitimacy as an independent and coequal branch of government.<sup>78</sup> Striking the right balance between these goals is crucial in order to create

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74. *Continuity Commission*, *supra* note 3.

75. *Id.*

76. *See id.*

77. *Id.*

78. *Id.*

a reconstituted Court that can effectively exercise its constitutional role during a time of intense pressures and challenges to the Nation's values, political institutions, and civil liberties.<sup>79</sup> Unlike the other branches, "[t]he judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever."<sup>80</sup> Therefore, the Court must rely exclusively on its constitutional status and legitimacy to carry out its decisions.<sup>81</sup>

Some proposed solutions favor legitimacy at the cost of delay, while others promise a quick return to a functioning Supreme Court at the expense of a decrease in the legitimacy of the Court as an institution.<sup>82</sup> For example, although quick recess appointments at the President's prerogative followed by confirmation hearings as soon as the Senate is able to convene would avoid a delay in restoring a quorum, the decisions of a Court dominated by recess appointees would likely be seen as less legitimate than those of a Court reconstituted after deliberation by the Senate.<sup>83</sup> Conversely, if the President refrained from making recess appointments and waited until the Senate reconstituted to begin the confirmation process, the legitimacy of the newly constituted Court would be enhanced at the cost of delay in establishing a Court to review pressing issues.<sup>84</sup>

There are other interests and goals at stake that need to be taken into account as well. For example, we should avoid solutions that require amending the Constitution unless necessary.<sup>85</sup> Aside from the practical concerns associated with adopting a constitutional amendment, there is the interest in preserving the Constitution as a document of general principles and structure that, where possible, leaves particular issues to the Congress to resolve. Furthermore, even with a statutory fix, there are a host of definitional problems that will need to be addressed, such as deciding: (1) what circumstances trigger any new procedures that would be enacted; (2) how to return to the status quo once the crisis subsides;

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79. *See id.*

80. THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Casey & James McCellan eds., 2001).

81. *See id.*

82. *See generally Continuity Commission, supra* note 3 (discussing four approaches to Supreme Court continuity and the advantages and disadvantages of each).

83. *Id.*

84. *Id.*

85. *See* U.S. CONST. art. V. We assume for purposes of this analysis that a constitutional amendment is extremely difficult to obtain, and consider it as an option only to the extent that the result is significantly more attractive than any statutory options.



and (3) whether the jurisdiction of any replacement court should be limited to the most pressing cases.<sup>86</sup>

We ultimately conclude that there are serious enough gaps in the existing structure that something should be done. However, we are also reluctant to propose changes to our constitutional structure in response to a worst-case scenario that (we can only hope) is highly unlikely. Moreover, we are apprehensive about defining the problem in a way that assumes the parties involved in the nomination and confirmation process will behave as bad actors. We think it is far more likely that the President and members of the Senate will rise to the occasion of a national emergency and seek to address the crisis in a spirit of bipartisanship and cooperation that would avoid many of these difficulties.<sup>87</sup>

### III. PROPOSED SOLUTIONS FOR ENSURING THE CONTINUITY OF THE SUPREME COURT

During a meeting of the Continuity of Government Commission in September 2002, James C. Duff, a former Administrative Assistant to Chief Justice Rehnquist, outlined four possible solutions to the problem of the continuity of the Supreme Court in the aftermath of a terrorist attack.<sup>88</sup> The first two of those options can be described as variations on the status quo in that they rely, with only slight adjustments, on the two mechanisms already provided for in the Constitution—the Appointments Clause and the Recess Appointments Clause.<sup>89</sup> The remaining two options represent more significant departures in that they involve designating replacements for the Justices in advance of a crisis.<sup>90</sup> We use

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86. See generally Charles E. Rice, *Statement of Opposition to the Continuity of Government's Proposal*, COALITION TO PRESERVE AN ELECTED CONGRESS, at <http://www.electcongress.org/articles/2003/rice-cog.shtml> (last visited Apr. 4, 2004).

87. See THE FEDERALIST NO. 76, *supra* note 80, at 395 (Alexander Hamilton). Hamilton observed:

The institution of delegated power implies that there is a portion of virtue and honor among mankind which may be a reasonable foundation of confidence; and experience justifies the theory. It has been found to exist in the most corrupt periods of the most corrupt governments. . . . [I]t is as little to be doubted that there is always a large proportion of the body which consists of independent and public-spirited men, who have an influential weight in the councils of the nation.

*Id.*

88. *Continuity Commission*, *supra* note 3.

89. See U.S. CONST. art. II, § 2, cls. 2-3; *Continuity Commission*, *supra* note 3; *infra* Part III.A-B.

90. See *Continuity Commission*, *supra* note 3; *infra* Part III.C-D.

Mr. Duff's framework to structure our analysis, although we discuss additional options.

### A. *The Appointment Process*

Perhaps the easiest and least controversial solution to the continuity problem is to stick as closely as possible to the existing mechanisms for continuity on the Court, namely the Appointments Clause and the Recess Appointments Clause.<sup>91</sup> Under the status quo, the President could use the Appointments Clause to restore a quorum to the Court in the aftermath of an attack by nominating individual Justices to fill the vacancies and submitting them for confirmation by the Senate.<sup>92</sup> The advantages of such an approach are clear. Because the Appointments Clause requires the consent of the executive and legislative branches and, once appointed, an Article III judge enjoys life tenure, Justices appointed through this process have inherent legitimacy.<sup>93</sup> They have the endorsement of the President and the Senate through the confirmation process, and they are insulated from political pressures by virtue of their life tenure.<sup>94</sup> At a time when newly appointed Justices may be called upon to decide issues of extreme national importance, some possibly going to the very heart of our system of government, having the advice and consent of the Senate along with life tenure would protect the Court from accusations that it is dominated by the executive branch.<sup>95</sup> By virtue of the historical pedigree of the appointments process itself, with over 200 years of tradition, the Court's authority during a time of crisis would be well preserved. Furthermore, the Appointments Clause, as with the Constitution's other checks and balances, serves a disciplining function on each of the other branches. The President, knowing that his nominees will have to pass muster before the Senate, is more likely to nominate candidates who will appeal to a broad segment of the country.<sup>96</sup>

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91. See U.S. CONST. art. II, § 2, cls. 2-3.

92. See *id.* cl. 2; 28 U.S.C. § 1 (2000) (requiring the presence of six Justices for quorum).

93. U.S. CONST. art. II, § 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . .”).

94. See *id.*; see also *id.* art. III, § 1 (“The Judges . . . of the supreme . . . Court[] shall hold their Offices during good Behaviour . . .”).

95. See *Continuity Commission*, *supra* note 3.

96. See THE FEDERALIST NO. 76, *supra* note 80, at 394 (Alexander Hamilton). Hamilton argued:

To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters

Similarly, in giving advice and consent, the majority in the Senate cannot be too recalcitrant because the President retains the power to nominate a replacement candidate.<sup>97</sup>

One of the greatest strengths of the Appointments Clause—and as it turns out, one of its drawbacks in these circumstances—is that it permanently fills any vacancies on the Court.<sup>98</sup> Unlike the Recess Appointments Clause, which provides a temporary solution but then requires the vacancies to be filled at the end of the next Senate session, the appointments process has the advantage of ending with a lifetime appointment for the Justices.<sup>99</sup> As a result, the appointments process avoids the potentially disruptive effect of changing personnel on the Court in the middle of a national crisis. Assuming a quorum has been restored through the appointments process and the reconstituted Court carries the added legitimacy that comes with the Senate's advice and consent, then life tenure ensures that the Court's authority will be preserved and only grow over time as the crisis subsides. In addition, life tenure ensures that during the national crisis, the newly appointed Justices will be insulated from political pressures and popular opinion.

Life tenure can also be a serious liability, however, if the immediate demands of a national emergency combined with political pressure not to be obstructionist result in a less searching review by the Senate. If, for example, the rush to fill vacancies in the aftermath of an attack or the party composition of the surviving senators produced confirmations with only minimal review, the public could perceive the Court as dominated by ideological appointees who were not sufficiently vetted by the Senate and who would enjoy life tenure. Even with searching oversight by the Senate, the reconstituted Court might be seen as less legitimate than its predecessors. To see how questions about the Court's legitimacy could arise, one need only imagine a scenario in which a minor cabinet officer

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from State prejudice, from family connection, from personal attachment, or from a view to popularity.

*Id.*

97. *Id.* According to Hamilton:

The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed, because they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain that a future nomination would present a candidate in any degree more acceptable to them . . . [therefore] it is not likely that their sanction would often be refused where there were not special and strong reasons for the refusal.

*Id.*

98. U.S. CONST. art. III, § 1.

99. *See id.* art. II, § 2, cls. 2-3; *id.* art. III, § 1.

assumed the Presidency and promptly appointed five of nine Justices. The damage to the Court's legitimacy in the long run from such appointments could be devastating.<sup>100</sup>

All of this, of course, assumes that the appointments process would run relatively smoothly after an attack, but the reality of a catastrophic attack on Washington, D.C. could render this option much less attractive. The biggest flaw in the Appointments Clause as a continuity in government provision is that it is time-consuming and can be contentious at a time when the government may require a speedy restoration of the Court and may not be well situated to weather the divisiveness of several simultaneous confirmation battles.<sup>101</sup> In order for the appointment process to work, moreover, a number of factors must be in place: there must be a President with the authority to nominate a candidate to fill the vacancy; the President must be able to select a nominee and communicate with the candidate; there must be a quorum in the Senate so that it is able to convene and consider the nomination;<sup>102</sup> and finally, a majority of the Senate must vote to confirm the President's nominee.

Each of these steps creates the potential for significant delays and the possibility of a breakdown in the appointment process.<sup>103</sup> In the aftermath of a terrorist attack, the line of Presidential succession may be in doubt.<sup>104</sup> Even if the Presidency were clear, the Senate might not be able to convene for some time to take up a nomination if it had suffered substantial casualties during the attack.<sup>105</sup> Assuming that the President

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100. *Continuity Commission, supra* note 3.

101. *Id.*

102. *See* U.S. CONST. art. II, § 2. Note, however, that the standing rules of the Senate authorize individual committees to conduct hearings and vote on nominations even during a recess. *See* COMM. ON RULES AND ADMIN., SENATE MANUAL, S. DOC. NO. 107-1, at 39 (2001). "Each standing committee, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate." *Id.* Therefore, while the full Senate would not be able to vote on a nominee until a quorum was restored, assuming enough members of the Judiciary Committee were still available, a significant part of the confirmation process could take place in advance of that point. *Id.*

103. *Continuity Commission, supra* note 3.

104. *See* John Forters, *President Micheal Armacost*, THE BROOKINGS REVIEW, Vol. 54, No. 4, Fall 2003, at 33.

105. *See id.* Special appointments of replacement senators under the Seventeenth Amendment would certainly speed-up the process of restoring a quorum to the Senate. However, if governors are able to appoint replacements from their own political party, regardless of the party affiliation of the deceased senator, some of the added legitimacy provided by the advice and consent of the Senate may be diminished by the public's perception that the Senate has been filled with appointees who do not represent the same values as those who were elected. *See* CONTINUITY OF GOV'T COMMISSION, *supra* note 46, at 23.

and the Senate are functioning, filling vacancies on the Court may not be the first priority for either branch.<sup>106</sup> And even if the Senate is willing and able to take up the nominations of several Supreme Court nominees, the process is bound to be time-consuming, particularly if there are highly controversial issues looming on the horizon that will soon be on the Court's docket. Therefore, while the Appointments Clause has the benefit of added legitimacy, it comes at the cost of a significant risk of delay.

In order to address the risk of delay, commentators have suggested slight modifications to the appointments process that might serve to move it along.<sup>107</sup> One such modification would be to impose a time limit on the confirmation process.<sup>108</sup> According to this proposal, during a time of national crisis or when the Court is without a quorum as the result of a national emergency, a time limit of, for example, one month, would be triggered after which the Senate would have to vote on the nominee.<sup>109</sup> This proposal raises two questions: first, is such a modification advisable, and second, would it require a constitutional amendment? As for whether a time limit is a good idea, we should keep in mind that it is only a partial solution to the problems described above and potentially a very minor solution. A time limit would not help the appointment process if there is no clear President to make nominations or the Senate is unable to convene.<sup>110</sup> Only after those preconditions have been satisfied does the issue of delay during the Senate's deliberations come into play. The shortened confirmation process may also lead to the appointment of less-qualified Justices whose qualifications have not been adequately explored. More importantly, a time limit may have unintended consequences that would make matters worse. By forcing a vote at the end of the time period, undecided senators might feel compelled to vote against a nominee rather than vote to confirm someone whom they have not had the opportunity to investigate and question sufficiently. In that situation, a few more weeks might be enough to satisfy the concerns of the undecided, whereas a time limit might lead them to reject the

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106. See *Continuity Commission*, *supra* note 3. In the immediate aftermath of the September 11 attacks, Congress and the President were focused on legislation expediting benefits for public safety workers killed or injured in the line of duty; appropriating emergency funds for the City of New York; authorizing the use of military force; securing the airports; compensating victims; and augmenting government powers to investigate and combat terrorism. It is difficult to predict where confirmation hearings might fall in this order of priorities, but it is fair to say that it is unlikely to be at the very top of the list.

107. *Id.*

108. *Id.*

109. *Id.*

110. See U.S. CONST. art. II, § 2.

nominee and cause more delay as a new nomination is made and the confirmation process starts over again. In addition, a curtailed confirmation process may cause the President's staff to spend less time doing their own internal vetting process which could lead to underqualified nominees, embarrassing discoveries, and further delay.

Congress could enact a statute setting forth a time limit for the Senate's deliberations during a time of national crisis. Such a statute, however, would be constitutionally unenforceable. The Appointments Clause requires the "Advice and Consent of the Senate" without qualifying its discretion in any way.<sup>111</sup> Any time limit imposed likely would be inconsistent with the discretion that the Framers delegated to the Senate.<sup>112</sup> Moreover, if the Senate were to fail to act in the prescribed time, that omission could not substitute for the constitutional requirement of advice and consent. A constitutional amendment implementing such a time limit is not only impractical, but also costly in comparison to the minimal gain in continuity.<sup>113</sup> A more feasible method would be for the Senate to adopt its own internal rule limiting the time for debate on Supreme Court nominees during a time of crisis.<sup>114</sup> In the same way that the Senate's cloture rules modify its discretion to give advice and consent, a Senate rule could require a vote after a certain amount of debate.<sup>115</sup>

### B. Recess Appointment Power

The other existing continuity mechanism to consider is the Recess Appointments Clause, which grants the President the "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."<sup>116</sup> Thus, if there were vacancies on the Court precluding a quorum and the Senate were unable to give advice and consent because

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111. *See id.*

112. *See id.* cl. 2. One might also argue that the Recess Appointments Clause acts as its own time limit because the President can always make a recess appointment if the Senate fails to vote up or down before the next recess. *Id.* The structure of Article II, Section 2, therefore, suggests that other than the President's ability to make a recess appointment, the Framers did not intend for there to be any limit on the Senate's ability to give advice and consent. *See id.* A counter-argument to this would be that Article II, Section 2 describes *the President's* power to make appointments and only qualifies that discretion with the advice and consent requirement; it does not grant the Senate unbridled discretion to consider a nominee indefinitely. *Id.* (emphasis added).

113. *See Continuity Commission, supra* note 3.

114. *Id.*

115. *Id.*

116. U.S. CONST. art. II, § 2, cl. 3.

it lacked a quorum as well, the President might seek to use his recess appointment power to fill those vacancies until the end of the next Senate session.<sup>117</sup> Using the Recess Appointments Clause has the advantage of speed, but it comes at some cost to legitimacy.<sup>118</sup> Although the President might quickly fill any vacancies without having to worry about the state of the Senate or a prolonged confirmation process, a Supreme Court with four or more recess appointees would clearly have less credibility in the eyes of the public and state and local governments.<sup>119</sup> Without the check of Senate approval, multiple recess appointees on the Court would be suspect.<sup>120</sup> With the prospect of future confirmation hearings at the end of the next session, their decisions could be portrayed as the product of political pressures.<sup>121</sup> Alternatively, they might be seen as unduly tied to the executive, lacking the imprimatur of Senate approval. This diminished legitimacy would tarnish the Court's rulings at a time when its authority would be needed most. Also, the recess appointments could last for a significant amount of time, considering that the appointment continues until the end of the next Senate session.<sup>122</sup> If the Senate were to continue the current session after it reconvened, the recess appointments would last over a year. At the end of the next Senate session, moreover, the Court would face another dramatic upheaval in its membership as all of the recess appointees would either face confirmation or be replaced with new nominees.<sup>123</sup>

In addition, there are open constitutional questions that could cast a cloud over the Court or lead to disruptive litigation in the middle of the national emergency. First, it might be argued that the Senate cannot adjourn if it has not declared a recess and the Senate cannot declare a recess without a quorum present.<sup>124</sup> Therefore, although at odds with common sense, there is some risk that an attack on Congress that either killed or incapacitated a substantial number of senators could leave the Senate stuck in session and thereby preclude the exercise of the

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117. *See id.*

118. *See Continuity Commission, supra* note 3.

119. *See id.*

120. *See id.*

121. *See id.*

122. *See* U.S. CONST. art. II, § 2.

123. *Id.*

124. *See id.* art. I, § 5. In addition, Article I, Section 5 provides that “[n]either House, during the Session of Congress, shall, without the consent of the other, adjourn for more than three days. . . .” *Id.* Without a quorum in the House to provide consent, therefore, the Senate may be unable to declare an official recess.

President's recess appointment power.<sup>125</sup> Second, the Supreme Court has yet to resolve the question of whether Article III judges may receive recess appointments or whether the time limit on their service violates the Life Tenure Clause.

Commentators have proposed making certain modifications to the recess appointment power in order to address the legitimacy issue.<sup>126</sup> One such proposal is to require the President to make recess appointments only after consultation with members of the Senate.<sup>127</sup> If the entire Senate is unable to give advice and consent, such a proposal would require the input of the Senate leadership or a subset of the surviving senators. Another proposal limits the number of recess appointees from any one major political party.<sup>128</sup> According to this proposal, no more than a bare majority of the recess appointees could be selected from the same political party as the President.<sup>129</sup>

It is clear that both of these proposals, if anything more than precatory, would require a constitutional amendment.<sup>130</sup> The Constitution states that the President "shall have Power to fill up all Vacancies that may happen during the Recess of the Senate."<sup>131</sup> While there is no relevant commentary from the Framers on the extent of the President's recess appointment power,<sup>132</sup> it is clear that the language of the Clause does not qualify that power except to create a time limit on the duration of the appointment.<sup>133</sup> Requiring the President to consult with members of the

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125. See COMM. ON THE JUDICIARY, *supra* note 40. In this report, the Senate Judiciary Committee interpreted a recess to be "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 functions." *Id.*; see also Executive Power-Recess Appointments, *supra* note 40, at 21-22 (stating that the question of whether the Senate is in recess for purposes of the Recess Appointments Clause "is whether in a practical sense the Senate is in session so that its advice and consent can be obtained"). Although this provides some support for a more pragmatic interpretation of a recess, it would not be binding on a court's interpretation of the Recess Appointments Clause.

126. *Continuity Commission*, *supra* note 3.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. U.S. CONST. art. II, § 2, cl. 3.

132. See JAMES MADISON, JOURNAL (Sept. 7, 1787), *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 540 (Max Farrand ed., 1966). See also *United States v. Woodley*, 751 F.2d 1008, 1017 (9th Cir. 1985) (Norris, J., dissenting) ("The contemporaneous writings of the Framers are virtually barren of any references to the Recess Appointments Clause. Although the record contains a few scattered references to the Clause, it was never explained, debated or discussed in any meaningful way.").

133. U.S. CONST. art. II, § 2.



Senate or limiting the President's choices based on political party affiliation would represent a significant infringement on the power delegated to the President under Article II.<sup>134</sup> During a time of national crisis, the President would likely decide to consult with the leadership of the Senate before making any recess appointments, and would decline to take advantage of a large number of vacancies on the Court to stack it with Justices on either extreme of the ideological spectrum. Without a constitutional amendment, however, these would have to be purely voluntary steps on the part of the President.<sup>135</sup>

Assuming a constitutional amendment would be feasible, there is still the issue of whether it makes sense as a policy matter to modify the recess appointment power in this way. Requiring a balance in terms of political party affiliation is more susceptible to criticism because it has both definitional problems and likely would have unintended negative consequences.<sup>136</sup> First, it might at times prove difficult to determine and verify an appointee's political party affiliation.<sup>137</sup> Although there are several non-Article III courts and independent agencies that have statutory limits on the number of appointees from a given party,<sup>138</sup> these are bodies that, unlike the courts, tend to draw from candidates who outwardly identify as members of a particular political party.<sup>139</sup> Judges, who form the most substantial pool of prospective nominees, tend not to wear their party loyalty (if any) on their sleeves.<sup>140</sup> Moreover, while party affiliation might correlate with judicial philosophy and, therefore, a party balance requirement might lead to an ideologically balanced Court, this is not necessarily the case—and it has proved unreliable, particularly with regard to Supreme Court appointments.<sup>141</sup> Second, such a requirement would over-politicize the appointment process in a way that would do harm to the Court's legitimacy.<sup>142</sup> By enacting into law a presumption that Justices will decide cases based on their preconceived ideologies and party commitments, we would institutionalize the perception that Justices are political actors and outcome driven.<sup>143</sup> In addition, Justices

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134. *Id.*

135. *See Continuity Commission, supra* note 3.

136. *Id.*

137. *Id.*

138. *Id.*

139. *See id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

appointed to create a balance of political party representation might feel compelled to vote along party lines to maintain that balance.

Regarding a requirement that the President consult with members of the Senate before making a recess appointment, this is less obviously problematic, but may be infeasible as a practical matter.<sup>144</sup> We simply cannot predict the status of the Senate leadership in the aftermath of an attack, and it is difficult (if not impossible) to compel *meaningful* consultation. Therefore, the consultation requirement may provide a false promise of legitimacy that is outweighed by the cost of obtaining a constitutional amendment.

Finally, both the Appointments Clause and the Recess Appointments Clause suffer from an additional problem that renders them inadequate to ensure the continuity of the Court even as modified along the lines described above. Neither the appointment power nor the recess appointment power address the problem of incapacitated Justices.<sup>145</sup> The Life Tenure Clause guarantees that even incapacitated Justices cannot be removed from the Court unless they resign or are impeached.<sup>146</sup> Thus, at least where Supreme Court Justices are temporarily incapacitated in a terrorist attack, the Appointments and Recess Appointments Clauses provide no solace.

### C. Lowering the Quorum Requirement

There may be a far easier way to address the absence of a quorum on the Court. Rather than attempting to fill vacancies at a time of crisis when there are likely to be substantial delays or legitimacy concerns, Congress might eliminate the need to fill those vacancies by lowering the number of Justices that constitute a quorum, thereby allowing the Court to hear and decide cases with fewer Justices present.<sup>147</sup>

The current quorum requirement for the Supreme Court is set by statute at six Justices.<sup>148</sup> While it is difficult to imagine the Supreme

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144. *Id.*

145. See Garrow, *supra* note 43, at 997 (discussing the problem of incapacitated Justices).

146. U.S. CONST. art. III, § 1; see also *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (stating “[t]he ‘good Behaviour’ Clause guarantees that Article III judges shall enjoy life tenure, subject only to removal by impeachment”) (citations omitted). We do not address the question of whether a permanently disabled Justice who is unable to resign—such as a Justice in an irreversible coma—could be replaced short of impeachment or, indeed, whether impeachment would be appropriate in such a case.

147. See 28 U.S.C. § 1 (2000).

148. *Id.* (stating “[t]he Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum”).

Court deciding cases with three or five Justices, nothing in the Constitution prevents it. The Constitution mandates the creation of a Supreme Court, but does not specify the number of Justices or set a quorum requirement.<sup>149</sup> The number of seats on the Court has varied over the years from six at its creation by the Judiciary Act of 1789, to seven in 1807, nine in 1837, ten in 1863, back down to seven in 1866, and finally settling at nine in 1869.<sup>150</sup> The quorum requirement has changed accordingly.<sup>151</sup> When the Court consisted of six members, for example, the quorum requirement was four.<sup>152</sup>

Without a quorum, the Court cannot convene to decide cases, and unless a majority of the remaining Justices determines that a given case can be heard by a quorum during the “next ensuing term,” the decision of the lower court is affirmed but without precedential effect.<sup>153</sup> If a terrorist attack disabled the government for a substantial period of time, the absence of a quorum could result in a number of questions of extreme national importance and urgency being decided by individual courts of appeals or state supreme courts without any final arbiter in place to resolve conflicts or provide the final word on the question.<sup>154</sup> By lowering the quorum requirement, however, in all but the most extreme scenarios, there would be a sufficient number of Justices remaining to hear and decide the issues.

This proposal calls for Congress to pass a statute amending 28 U.S.C. § 1 to lower the quorum requirement under certain specified circumstances.<sup>155</sup> With regard to the optimal number for a quorum in these circumstances, it seems clear that we would not want a single Justice acting as the Supreme Court and deciding cases with the full precedential force of the Court’s decisions.<sup>156</sup> By the same token, a two-Justice Court would raise the same legitimacy concerns and could create a potential for split decisions that would leave us in the same place as the current statutory framework. A quorum of three Justices, however,

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149. See U.S. CONST. art. III.

150. Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73; Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 420, 421; Act of Mar. 3, 1837, ch. 34, 5 Stat. 176, 176; Act of Mar. 3, 1863, ch. 100, § 1, 12 Stat. 794, 794; Act of July 23, 1866, ch. 210, § 1, 14 Stat. 209, 209; Act of Apr. 10, 1869, ch. 22, § 1, 26 Stat. 44, 44.

151. See *supra* note 150.

152. Judiciary Act of 1789, ch. 20, § 1.

153. 28 U.S.C. § 2109.

154. See *supra* text accompanying notes 71-72.

155. See 28 U.S.C. § 1 (currently setting quorum at six Justices).

156. See *Locks v. Commanding Gen., Sixth Army*, 89 S. Ct. 31, 32 (1968) (stating that “apart from granting stays, arranging bail, and providing for other ancillary relief, an individual Justice . . . has no power to dispose of cases on the merits”).

would likely be sufficient, particularly since the current framework allows cases to be decided by a three-judge panel of the court of appeals.<sup>157</sup>

Assuming there would be support for lowering the quorum requirement as a continuity mechanism, it would be difficult to justify having the reduced Court review and decide all cases that would otherwise be on the Court's docket. For routine cases involving private disputes or even standard criminal appeals, the costs associated with holding the case over to another Term or the risk of leaving an issue unresolved because the decision below is affirmed without precedential effect would not be sufficient to justify what is essentially an emergency procedure.<sup>158</sup> Therefore, any proposal along these lines would have to include a provision limiting the Court's jurisdiction to cases of extreme national importance and in need of immediate resolution.<sup>159</sup>

Provided these definitional issues can be resolved, this proposal has several advantages over the alternatives discussed so far. First, because the quorum requirement is set by statute, it could be adjusted without requiring a constitutional amendment. Second, the Court would be made up of Justices who were nominated by the President, confirmed by the full Senate, and served as sitting Justices prior to the crisis. Third, there would be no delay in hearing and deciding cases because as soon as the Chief Justice is able to determine how many Justices have survived

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157. See, e.g., 28 U.S.C. § 46(b) (providing that “[i]n each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court”); *Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983) (affirming a decision of the Ninth Circuit Court of Appeals due to absence of quorum); *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 211 F.3d 853, 854 (4th Cir. 2000) (order denying an initial hearing en banc) (Wilkinson, C.J., concurring) (stating that per 28 U.S.C. § 46, “Congress has decided that the basic unit for hearing an appeal from the judgment of a district court is a panel of three”); Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 221 (1999) (stating that “[m]any court of appeals procedures, including hearing cases in three-judge panels, can be traced to the procedures of the courts that preceded them); see generally *id.* at 221-23 (discussing three-judge panels).

158. See Patrick Johnston, *Civil Justice Reform, Juggling Between Politics and Perfection*, 62 FORDHAM L. REV. 833, 876-80 (1994).

159. Cf. *Ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1242 (D.C. Cir. 1987) (order denying a rehearing en banc) (Edwards, J., concurring). Justice Edwards stated:

The decision to grant *en banc* consideration is unquestionably among the most serious non-merits determinations an appellate court can make, because it may have the effect of vacating a panel opinion that is the product of a substantial expenditure of time and effort by three judges and numerous counsel. Such a determination should be made only in the most compelling circumstances.

and whether that number meets the new quorum requirement, the Court could resume its Term.<sup>160</sup> Fourth, even if up to six Justices were incapacitated, the Court could still hear and decide cases. Finally, although nothing under this scheme would prevent the President from making recess appointments during this time—and thereby stacking the Court with handpicked Justices—by having a functioning Court in place, this proposal would go a long way toward eliminating any justification for such appointments (at least on a mass basis) and would thereby create a significant political disincentive to such strategic behavior.

However, a lower quorum requirement is not without its dangers. In a situation where the three remaining Justices were all at one end of the spectrum in their judicial philosophy, for example, a three-Justice Court could fail to garner sufficient public respect.<sup>161</sup> Even without an ideological imbalance, however, the decisions made by three Justices might be seen as less authoritative than those made by a full complement of nine.<sup>162</sup> Nonetheless, the reduced quorum approach has considerable merit. In the end, its one critical flaw is that it fails to account for those cases in which not even three Justices remain able to serve after an attack.

#### D. Create an Intermediate Court

As an alternative to lowering the quorum requirement, Congress could designate particular individuals or offices in advance of an attack to fill vacancies on the Court as they arise during a time of national crisis.<sup>163</sup> This could be called the Presidential Succession Model of ensuring continuity because, like the Presidential Succession Act, it would specify an order of succession in advance of the need to restore the Court to a

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160. See *Continuity Commission*, *supra* note 3.

161. See *Should Ideology Matter?: Judicial Nominations 2001: Hearings Before the Subcomm. on Admin. Oversight and the Courts*, 107th Cong. (2001) (testimony of Professors Laurence Tribe and Cass Sunstein), [hereinafter *Hearings*], reprinted in *Senate Committee Hearings on the Judicial Nominations Process*, 50 *DRAKE L. REV.* 429, 439-52, 463-75 (2002) (testifying to the propriety and need of establishing ideological balance on the Court).

162. Cf. *Church of Scientology of Cal. v. Foley*, 640 F.2d 1335, 1340-41 (D.C. Cir. 1981) (Robinson, J., dissenting with Edwards & Ginsburg, JJ.). Judge Robinson, joined by Judge Edwards and then-Judge Ginsburg, stated that en banc courts “are convened only when extraordinary circumstances exist that call for *authoritative* consideration and decision by those charged with the administration and development of the law of the circuit.” *Id.*

163. Cf. 28 U.S.C. § 291(a) (2000) (setting forth that “[t]he Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request by the chief judge or circuit justice of such circuit”).

quorum.<sup>164</sup> As with the option of lowering the quorum requirement, this proposal has the benefit of eliminating any delay in filling vacancies.<sup>165</sup> Moreover, by designating replacements in advance of a crisis, this proposal may solve the legitimacy problem by allowing for Senate confirmation and removing the appointment decision from the exigencies of the crisis.<sup>166</sup>

One suggestion along these lines is to have individuals who are nominated by the President and confirmed by the Senate be, in effect, reserve Supreme Court Justices.<sup>167</sup> These individuals could be nominated to replace specific Justices or they could fill vacancies as they arise in order of seniority. Under this scenario, the Senate could hold confirmation hearings and deliberate on a normal schedule. This option, however, raises a number of difficulties. First, it would likely require a constitutional amendment because, once confirmed and appointed to serve on the Supreme Court, Congress would lack the authority to then limit the service of the “reserve” Justices to times of national crisis when the Court would otherwise lack a quorum.<sup>168</sup> Indeed, the Life Tenure

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164. See 3 U.S.C. § 19 (2000) (governing Presidential succession in the event of vacancy in the offices of both President and Vice President).

165. Cf. *id.*; see also William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: “The Emperor Has No Clones,”* 75 GEO. L.J. 1389, 1433-34 (1987). The authors explain:

Although section 19 does not explicitly require the Speaker or President pro tempore to take the presidential oath of office, the legislative history suggests Congress assumed that the congressional officers would do so. By contrast, section 19 clearly requires Cabinet officers to take the presidential oath of office prior to succession to the Presidency, and specifies that taking the oath constitutes resignation from Cabinet office.

*Id.*

166. Cf. 3 U.S.C. § 19(e) (setting eligibility requirements on officers in the line of succession). Section 19(a), (b), and (d):

[A]pply only to such officers as are eligible to the office of President under the Constitution. Subsection (d) of this section shall apply only to officers appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, inability, or failure to qualify, of the President pro tempore, and only to officers not under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon them.

*Id.*

167. Cf. U.S. CONST. amend. XXV, § 1 (providing that “[i]n case of the removal of the President from office or his death or resignation, the Vice President shall become President”).

168. *Id.* art. III, § 1; see also *INS v. Chadha*, 462 U.S. 919, 944 (1983) (stating “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if is contrary to the Constitution.

Clause would seem to preclude a law that would move reserve Justices in and out of office based on external events.<sup>169</sup> Second, for the same reason that we are concerned about having one President appoint a majority of the Court in the aftermath of an attack, we should also be concerned about one President choosing all nine reserve Justices.<sup>170</sup> While this problem could be remedied by staggering the appointment of reserve Justices, it would take decades to produce a full roster of replacements which would defeat the purpose of the reserve Court. Third, even if we could resolve this practical problem, a future President might feel pressure to nominate one of the reserve Justices to fill a vacancy on the Court that arose in the normal course. If not, then it would seem that the authority of the reserve Justices might be diminished by the fact of their being passed over for full appointment.

An alternative approach along these lines would be to designate particular offices rather than individuals to fill vacancies on the Court. For example, vacancies on the Court caused by a national emergency could be filled by the chief judges of the courts of appeals in order of their seniority.<sup>171</sup> This would solve the practical problem of a single President appointing the reserve Justices, because the chief judges of the various circuits will have already been appointed to the courts of appeals by various presidents, and their designation as chief judge is beyond the control of the sitting President.<sup>172</sup>

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Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.”).

169. See U.S. CONST. art. III, § 1 (stating “[t]he 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”).

170. See, e.g., Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 215 (1999) (noting in circuit court panels that ideological imbalances “often lead to case outcomes that reflect partisan interests. Indeed, there is now evidence that when a circuit court panel is unified with like-minded partisans (3-0 panels of Democratic or Republican appointees), ideological voting is quite pronounced, with neutral precedent often manipulated or ignored altogether.”).

171. Cf. 28 U.S.C. § 292(a) (2000) (authorizing district court judges to sit by designation on the court of appeals). Section 292(a) states:

The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit.

*Id.*

172. *Id.* § 45. This section states:

The chief judge of the circuit shall be the circuit judge in regular active service who is senior in commission of those judges who—(A) are sixty-four years of age

Nevertheless, this proposal would likely still require a constitutional amendment.<sup>173</sup> Without a separate confirmation process, we would have to assume that the confirmation of judges to the courts of appeals is sufficient to encompass the Senate's advice and consent on their nomination to the Supreme Court. While this might be possible going forward, it certainly is not presently the case for judges sitting on the courts of appeals.<sup>174</sup> In confirming those judges, the Senate did not contemplate that they might be sitting on the Supreme Court.<sup>175</sup> Although in certain circumstances the duties of an appointed official can be expanded beyond those specified in his or her original appointment without requiring a new confirmation process,<sup>176</sup> the role of a Supreme Court Justice is too far afield of a court of appeals judgeship to fit within this category. Moreover, it is not at all clear that the Constitution would permit Congress to enact a law that would, in essence, move judges on and off the Supreme Court based on the number of vacancies and the level of national crisis.<sup>177</sup>

A more promising option that would avoid the need for a constitutional amendment would be for Congress to create an inferior tribunal that would convene only in times of national emergency, when

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or under; (B) have served for one year or more as a circuit judge; and (C) have not served previously as chief judge.

*Id.* Chief judges serve for a term of seven years and are required to serve after the expiration of their term until another judge is eligible. *Id.* Additionally, no circuit judge may serve as chief judge of the circuit after attaining the age of seventy. *Id.*

If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as circuit judge, he may so certify to the Chief Justice of the United States, and thereafter the chief judge of the circuit shall be such other circuit judge who is qualified to serve or act as chief judge.

*Id.*

173. See Howard M. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281, 283-84 n.8 (2003).

174. 28 U.S.C. § 44.

175. See *id.*

176. See *Shoemaker v. United States*, 147 U.S. 282, 301 (1893). Writing for the Court, Justice Shiras stated:

[W]e do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

*Id.*; see also *Weiss v. United States*, 510 U.S. 163, 170-76 (1994).

177. It is true that district court judges, at times, sit on the courts of appeals, but the constitutional status of the Justices of the Supreme Court is likely sufficiently distinct that, once qualified to sit on the Supreme Court, a Justice could not then be denied that privilege.



the Supreme Court was unable to hear cases for lack of a quorum.<sup>178</sup> This intermediate court of appeals would be able to resolve circuit splits and could act as a court of last resort in cases related to the national emergency. The tribunal could include the remaining Supreme Court Justices and draw from the chief judges of the courts of appeals, but its jurisdiction would be narrowly defined and it could be convened only for a limited duration until the Supreme Court could be reconstituted through the normal appointment process.

As with the proposal to lower the quorum requirement, Congress would need to define both the circumstances that trigger convening the court and the scope of its jurisdiction. Out of concern that the court might convene unnecessarily, Congress could require that a supermajority of the court's members vote in favor of convening before the court can hear cases.<sup>179</sup> As for the scope of its jurisdiction, it seems entirely unnecessary to have the court deciding, for example, ERISA cases.<sup>180</sup> Therefore, its jurisdiction should be discretionary and limited to cases of extreme national importance.

An intermediate court along these lines has all the benefits of lowering the quorum requirement and may avoid some of the pitfalls of that approach.<sup>181</sup> Establishing the court would not require a constitutional amendment, because Congress already has the power under Article I, Section 8 to create inferior tribunals.<sup>182</sup> Although the Constitution makes clear that there shall be only "one Supreme Court,"<sup>183</sup> the duties of such a new intermediate court would be sufficiently limited that it would not constitute a second Supreme Court. Significantly, the Supreme Court, once reconstructed, would have the clear authority to set aside the precedents of the new intermediate court. Moreover, the mere fact that the intermediate court would have the authority to settle legal issues in the interim would not make it a second Supreme Court. Indeed, lower courts frequently decide cases that are not subject to review and, even where the Supreme Court cannot review one of those decisions for lack

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178. See *Continuity Commission*, *supra* note 3; Paul Taylor, *Alternatives to a Constitutional Amendment: How Congress May Provide for the Quick, Temporary Filling of House Member Seats in Emergency by Statute*, 10 J.L. & POL'Y 373, 386 (2002). Over the years, there have been various proposals to create an intermediate court of appeals between the circuits and the Supreme Court.

179. See U.S. CONST. art. III, § 1 (authorizing Congress to "ordain and establish" inferior courts).

180. See *id.* Congress would have the power under Article III to limit the Court's jurisdiction to more pressing matters during an emergency. See *id.*

181. *Continuity Commission*, *supra* note 3.

182. See *id.*; see also U.S. CONST. art. I, § 8.

183. U.S. CONST., art. III, § 1.

of a quorum, no one would suggest that the lower court had become a second Supreme Court. The members of this court would be drawn from sitting Justices and judges who will have been nominated by a duly elected President and confirmed by the Senate in advance of any national emergency.<sup>184</sup> The court could convene and hear cases without delay even if the Supreme Court lacked a quorum due to the incapacitation of some of the Justices.<sup>185</sup>

Moreover, by supplementing the surviving Justices with chief judges from the courts of appeals chosen by seniority, an intermediate court is less likely to be ideologically skewed.<sup>186</sup> Even if the remaining Justices would all be at one end of the ideological spectrum, adding to the number of decisionmakers will increase the chances of a more ideologically diverse decision-making body and more moderate decisions.<sup>187</sup>

#### IV. CONCLUSION

Although there is merit to either lowering the quorum requirement or creating an intermediate court as a solution to the Supreme Court's continuity problem, we ultimately recommend the latter because it strikes the optimal balance between quick restoration and preserving the Court's legitimacy. An intermediate court made up of the surviving Justices and chief judges from the courts of appeals offers all the advantages of both proposals, without the risk of ideological imbalance that accompanies a three-member Supreme Court or the risk that not even three Justices might be able to serve following an attack. This option provides a relatively seamless transition to a fully functioning court of last resort, makes use of the accumulated wisdom of the sitting Justices, and likely would not require a constitutional amendment. The Supreme Court is certainly the least vulnerable branch, but the Court's ability to serve its constitutional function during a time of national crisis and help weather the strains on the other branches would be greatly enhanced by implementing this proposal.

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184. *Continuity Commission*, *supra* note 3.

185. *See id.*

186. *See Hearings*, *supra* note 161.

187. *See* Cass Sunstein et al., IDEOLOGICAL VOTING ON FEDERAL COURTS OF APPEALS: A PRELIMINARY INVESTIGATION, 44-45 (Sept. 2003) *available at* <http://www.law.uchicago.edu/policy/judges/pdf/preliminary.pdf>.

