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THE LEGISLATION AND POLICY ROUNDTABLE



AN ECONOMY IN CRISIS: WHAT CAN BE DONE?

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The Limits of Presidential Recess Appointment Power

Mike McNerney

Introduction

The power of the presidency ebbs and flows, often depending on who is in office. Popular presidents during times of national calamity seem to be able to do almost anything they want. Other times, the nation's chief executive must practically beg Congress to support his national agenda. There are, however, a few areas where every president can exercise almost absolute power, like when making a recess appointment. The ability of a president to appoint someone to high federal office without Senate oversight is a practice that seems to be growing. Of particular importance among these appointments are federal judgeships because judges play a major role in policy-making.

Our most recent former President, George W. Bush, made over 171 recess appointments.¹ For six of President Bush's eight years in office, a majority of United States Senators were from the same political party as the President, the Republican Party.² Unfortunately for President Bush, control of the Senate eventually switched to the Democratic Party.³ While an uneasy truce orchestrated by the "Gang of 14" in 2005 kept judicial appointment warfare to a minimum, there were a few appointment flare-ups.⁴ For example, the nomination of Leslie Southwick to the Fifth Circuit Court of Appeals only narrowly won Senate

¹ See Henry B. Hogue, *Recess Appointments: Frequently Asked Questions*, CRS REPORT FOR CONGRESS, Mar. 12, 2008, at CRS-2.

² See John M. Broder, *The 2006 Elections: The Senate; Democrats Topple G.O.P. Incumbents in Three State Contests*, N.Y. TIMES, Nov. 8, 2006 (remarking that control of the Senate now hinged on the election of Jim Webb from Virginia).

³ See *id.*

⁴ See generally *Senators Compromise on Filibusters*, CNN, MAY 4, 2005, <http://www.cnn.com/2005/POLITICS/05/24/filibuster.fight/index.html> (explaining that a bipartisan compromise over judicial nominations has been struck by fourteen senators in order to avoid a partisan showdown).

approval after being favorably voted out of the Judiciary Committee by only one vote.⁵ The legislature's distrust of the executive caused Senate leadership to take procedural measures to prevent the body from going into extended recesses, thereby preventing the use of the recess appointment power.⁶ Now that President Barack Obama has taken office, recess appointments will likely be less frequent. However, a change in partisan control in either branch could set off tensions once again.

The purpose of this article is to examine the constitutional, legislative, and traditional authority of the President to make recess appointments. The second section discusses the background of the current debate by framing the issue in the context of recent controversial appointments.⁷ The third section examines the constitutional language and common law interpretation of the President's authority.⁸ The fourth section looks at appointment power legislation passed by Congress.⁹ The fifth section provides parliamentary and legislative recommendations for Congress to act upon to keep its authority.¹⁰ The article concludes by providing a final examination of the reason for a limited presidential recess appointment power.¹¹

⁵ See *Senate Confirms Judge for U.S. Appeals Court*, WASH. POST, Oct. 25, 2007, at A07 (remarking that Judge Southwick only made it out of the Judiciary Committee after Senator Feinstein voted with the Republicans).

⁶ See Paul Kane, *Senate Stays in Session to Block Recess Appointments*, WASH. POST, Nov. 17, 2007, at A04 (reporting that the Senate Majority Leader will keep the Senate in *pro forma* session in order to prevent the President from making any recess appointments).

⁷ See *infra* Background (naming several controversial appointments and some of the political ramifications that followed).

⁸ See *infra* Constitutional Understanding of the Appointments Clause (analyzing the Constitution, the Founders' intent, and related court opinions).

⁹ See *infra* Legislation Regarding the Appointments Clause (focusing on committee reports and congressional resolutions in the absence of statutes).

¹⁰ See *infra* Recommendations (examining the procedures Congress can take to limit unwanted recess appointments as well as political ramifications).

¹¹ See *infra* Conclusion.

Background

In the early days of the republic, the Congress would take long intersessional recesses and the vast distances members traveled used to make returning quickly difficult.¹² The Framers gave the President the power to make temporary appointments to offices under the federal government in order to fill vacancies which may arise during this recess.¹³ Former President Bush showed his proclivity for recess appointments many times, and not just during intersession but also intrasession recesses.¹⁴ As of June 4, 2007, President Bush had made 171 recess appointments, 141 of which were made intrasession.¹⁵ For example, he appointed Sam Fox, a man famous for bankrolling the “Swiftboat Veterans for Truth,” as Ambassador to Belgium on April 4, 2007.¹⁶ He also used an intrasession recess to appoint the controversial John Bolton as Ambassador to the United Nations.¹⁷ President Bush also used senatorial recesses as an opportunity to appoint highly unpopular judges who would not have made it through the regular confirmation process, including Bill Pryor (during an intrasessional recess of only 10 days) and Charles Pickering.¹⁸ The Constitution only allows such appointments to last until the end of the next session, but once they are in, the battle is already half won.¹⁹ For example, when Bill Pryor’s recess appointment concluded, he was still confirmed by the Senate for a lifetime term as

¹² See Michael A. Carrier, *When is the Senate in Recess for Purposes of the Appointments Clause?*, 92 MICH. L. REV. 2204, 2225 (1994).

¹³ See *id.*

¹⁴ See Henry B. Hogue, *Recess Appointments: Frequently Asked Questions*, CRS REPORT FOR CONGRESS, Jan. 16, 2007, at CRS-5 [hereinafter FAQ] (defining *intersession* as “between sessions or Congresses” and *intrasession* as “during a recess within a session”).

¹⁵ See Henry B. Hogue, *Recess Appointments Made by President George W. Bush, January 20, 2001 – June 4, 2007*, CRS REPORT FOR CONGRESS, June 14, 2007, at CRS-3 [hereinafter Recess Appointments] (providing the number of people appointed by President Bush during a congressional recess and stating that 165 of the 171 appointees were also nominated for the position).

¹⁶ See generally Tahman Bradley, *Bush Swift Boats Belgium, Congress*, ABC NEWS, Apr. 4, 2007, <http://abcnews.go.com/Politics/Story?id=3009058&page=1> (describing how President Bush appointed Sam Fox during a recess after he was unable to get him confirmed).

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See U.S. CONST. art. II, § 2, cl. 3.

part of the deal agreed to by the “Gang of 14” in 2005 (Charles Pickering retired after the termination of his recess appointment).²⁰ Further complicating the issue, a 1993 Department of Justice (DOJ) brief filed in support of a federal case involving a recess appointment implied that the President is permitted make recess appointments during any recess of more than three days.²¹

Constitutional Understanding of the Appointments Clause.

The Constitution states: “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.”²² Up until now, the term “recess” has gone largely undefined, mostly because intrasession recess appointments are a relatively new phenomenon.²³ In light of these new intrasessional recess appointments by the President, an effort to determine the Framers’ intent and to clarify not only the term “recess” but also the phrase “may happen during” should be undertaken. The courts have yet to tackle this issue in a substantive way, but the Supreme Court has held that it will emphasize the significance of every word in the Constitution in making its decisions.²⁴

The Framers Intended the Senate to Have a Major Role in Judicial Appointments

²⁰ See Transcript of Interview by John Gibson with Charles Pickering, Judge, Fifth Circuit Court of Appeals (Oct. 12, 2005), <http://www.foxnews.com/story/0,2933,172016,00.html>

²¹ See *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993).

²² U.S. CONST. art. II, § 2, cl. 3.

²³ See FAQ, *supra* note 14, at CRS-5 (commenting that intrasession recess appointments were rare until the 1940s and often provoked controversy in the Senate by usurping their constitutional power to confirm nominations).

²⁴ See *Holmes v. Jennison*, 39 U.S. 540, 571 (1840) (plurality opinion) (“[N]o word was unnecessarily used, or needlessly added Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood”); see also *United States v. Sprague*, 282 U.S. 716, 732 (1931) (stating that the Constitution was drafted with “meticulous care and by men who so well understood how to make language fit their thought”).

During the Constitutional Convention, James Madison recognized that giving the appointment power to many would not produce the best judiciary.²⁵ However, Madison also agreed that the power was too great to give to one man.²⁶ Preliminarily, he proposed that the Senate would be the best body to select the judiciary because “it is not too small to easily abuse the authority, and not too large to be hampered by politics.”²⁷ Roger Sherman and William Pinckney agreed and promoted the opinion that the Senate should have the sole power to appoint the federal judiciary.²⁸ Laura Gorham disagreed and argued that because the Senate was composed of many members, it would not be as accountable for inadequate appointments as would a single president.²⁹ Therefore, Gorham suggested that the President should appoint federal judges with the advice and consent of the Senate.³⁰ After a lengthy debate, the Convention adopted Gorham’s proposal to create the language of the Appointments Clause.³¹ This compromise by the Framers in the writing of the Appointments Clause divided the appointment authority between the President and the Senate, thus giving both parties a significant role in the process of selecting federal judges.³² Even Alexander Hamilton, a well known advocate for a strong executive, favored the Appointments Clause because it gave the Senate more authority than a mere rubber stamp to the President.³³

The Only Vacancies Which Qualify for Recess Appointments are Vacancies Which *Arise* During an Intersession Recess, not Vacancies Which Merely *Exist* During Recess

²⁵ See Laura T. Gorjanc, *The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent*, 54 CASE W. RES. L. REV. 1435, 1450 (2004) (noting that Madison appreciated the viewpoints of *several convention attendees and helped broker a compromise*).

²⁶ See *id.*

²⁷ *Id.*

²⁸ See *id.*

²⁹ See *id.* at 1451.

³⁰ See *id.*

³¹ See *id.*

³² See *id.*

³³ See *id.*

The appellate court in *U.S. v. Alocco* for the first time perceived “nothing in the Constitution which indicates that judicial appointments are to be treated differently from any other appointments subject to Senate confirmation.”³⁴ The court also stated that the term “happen,” within the constitutional provision authorizing the President to fill vacancies that may happen during recess of the Senate, does not require that a vacancy fall open during a recess.³⁵ However, that interpretation of the Constitution violates the principle that each constitutional word must be examined.³⁶ Had the Founders intended the meaning to be as the appellate court held in *Alocco*, they would have simply omitted the term “happen” altogether and written the clause as “The President shall have Power, during the recess of the Senate, to fill up all Vacancies by granting Commissions which shall expire at the End of their next Session.”³⁷ This position is further buttressed by the two other times the term “happen” is used: the Senate Vacancy and House Vacancy Clauses.³⁸ Both clauses give strong credence to an “arise theory” of the phrase “may happen during,” as opposed to an “exist theory,” when attempting to answer the question of whether vacancies *must arise* during recess, or *may exist* during recess.³⁹ If the

³⁴ 305 F.2d 704, 710 (2d Cir. 1962).

³⁵ See *id.* at 712 (deciding that if the President’s recess power is limited to vacancies which arise while the Senate is away, all the intense “preparation must be telescoped into whatever time remains in a session if the vacancy arises while the Senate is in session”).

³⁶ See *Holmes*, 39 U.S. at 571 (“[N]o word was unnecessarily used, or needlessly added . . . Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood”); see also *Sprague*, 282 U.S. at 732 (stating that the Constitution was drafted with “meticulous care and by men who so well understood how to make language fit their thought”).

³⁷ *Contra* U.S. CONST. art. II, § 2, cl. 3.

³⁸ See U.S. CONST. art. I, § 2, cl. 5 (“When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies”); U.S. CONST. amend. XVII, § 1, cl. 2 (“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”).

³⁹ See Edmund Randolph, *Opinion on Recess Appointments (July 7, 1792)*, in 24 THE PAPERS OF THOMAS JEFFERSON 165, 167 (John Catanzariti ed., 1990) (advising Thomas Jefferson in a handwritten opinion that no appointment could be made to a new position, Chief Coiner of the United States Mint, for which no nomination had been made before the Senate recessed). *But see* 19 Op. Att’y Gen. 261 (1889); 17 Op. Att’y Gen. 521 (1883); 16 Op. Att’y Gen. 522 (1880); 12 Op. Att’y Gen. 32 (1866); 4 Op. Att’y Gen. 523 (1846); 2 Op. Att’y Gen. 525 (1832); 1 Op. Att’y Gen. 631 (1823); see also *Alocco*, 305 F.2d at 713 (“The Attorneys-General of the United States,

words in the Constitution are to be carefully scrutinized, then it is difficult to claim that the word “happen” in the Appointments Clause promotes an exist theory while the same word promotes an arise theory everywhere else.⁴⁰

Narrowly Construing the Appointments Clause, Especially in the Case of Federal Judges, Protects the Independence of the Judiciary

Because the recess appointment clause permits an exception to the rules safeguarding the independence of the judiciary, it might bear a narrower interpretation as applied to judges than as applied to executive officials.⁴¹ Most other presidential appointments serve in the executive branch as an arm of the President. Therefore, the argument that the executive branch should always be capable of exercise only makes sense as applied to executive branch appointments. The judicial branch, however, is wholly separate and, therefore, in greater need of the “advice and consent” role played by the Senate.⁴² This role helps to ensure that federal judges are not wholly-owned subsidiaries of the executive branch. Otherwise, the judiciary could become filled with judges who owe their positions entirely to the President and could be better described as executive stalwarts than independent arbiters.⁴³

Modern Senate and Federal Judiciary Procedures Favor a Narrow Interpretation in Order to Best Institute Constitutional Checks and Balances

committed with the responsibility of advising the President concerning the scope of his constitutional powers, have held in a long and continuous line of opinions that the recess power extends to vacancies which arise while the Senate is in session”).

⁴⁰ *Contra* 1 Op. Att’y Gen. at 632 (an exist theory is consistent with the purpose of the clause, to “keep . . . offices filled.”); 12 Op. Att’y Gen. at 35 (“It is of the very essence of executive power that it should always be capable of exercise”).

⁴¹ See Thomas A. Curtis, *Recess Appointments to Article III Courts: The use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1759 (1984) (noting that, among other difficulties, the recess appointments clause complicates the appointment of federal judges because they lack the attributes of life tenure and guaranteed salary, which may violate article III).

⁴² See THE FEDERALIST Nos. 47-51, 323-353 (Madison) (J. Cooke ed., 1961) (invoking Montesquieu as justification for the separation of powers as the essence of the vanguard of liberty).

⁴³ See Gorjanc, *supra* note 25 at 1450 (outlining the concern some of the Founders had with granting the executive the sole power to appoint federal judges).

Normal confirmation procedures are particularly effective in cases in which vacancies arise through the maturing of a resignation, rather than through an unforeseeable event. The modern Senate is in session for about eight months a year; thus, the Senate is available to confirm appointments most of the year.⁴⁴ In addition, federal judges can be, and frequently are, transferred from one court to another and from retirement to active duty. All judges sitting by designation have full judicial powers. Further, the increased numerical strength of the federal judiciary now provides a wider base over which additional work could be spread. Under these conditions, it is difficult to imagine that the judiciary would be substantially paralyzed if judicial vacancies arising during Senate sessions could not be filled by way of recess appointments. Thus, the court's fear of governmental paralysis in *Allocco* seems unwarranted.⁴⁵ Generally, the absence of a particular executive or judicial official will mean, at worst, a temporary allocation of his or her functions to others; in cases of true emergency, the Senate could postpone its adjournment in order to fill a vacancy arising near the end of the session.⁴⁶

An IntraseSSIONAL Recess of Only Three Days is Not Sufficient to Trigger the President's Recess Appointment Power

The DOJ has mentioned in several amicus briefs that only adjournments for less than three days are to be considered *de minimis* for purposes of recess appointments.⁴⁷ The DOJ mentions this in passing without much authority, but other legal scholars have justified this view.

As explained by Edward Hartnett:

⁴⁴ See U.S. SENATE, TENTATIVE 2007 LEGISLATIVE SCHEDULE, available at http://www.senate.gov/pagelayout/legislative/two_column_table/2007_Schedule.htm (last visited March 8, 2009).

⁴⁵ See 305 F.2d at 710 (ruling based on the perceived "danger of setting up a roadblock in the orderly functioning of the government which would result if the President's recess power were limited").

⁴⁶ See U.S. CONST. art. II, § 4, cl. 2 (stating that Congress shall meet at least once a year but giving no instruction on when either house must recess).

⁴⁷ See, e.g., *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993).

The argument is that if one of the two governmental entities that must act jointly to perform a constitutional function chooses to disable itself from acting—thereby disabling the joint action—for any longer period of time, the countervailing power is triggered in the other. In the case of the relationship between the House and Senate (who must act jointly to pass legislation), a longer recess triggers the power to withhold consent to the recess. In the case of the Senate and the President, a longer recess triggers the ability to make interim appointments. Thus the constitutional rule mandating agreement between the House and Senate for adjournments of more than three days gives analogous guidance between the Senate and President.⁴⁸

However, the DOJ's argument is flawed. This new position flies in the face of the previous doctrine of practicality developed by Attorney General Harry Daugherty in 1921.⁴⁹

Under this test, an intrasession adjournment could be deemed “the Recess” for purposes of the Recess Appointments Clause only when the Senate is “absent so that it can not receive communications from the President or participate as a body in making appointments.”⁵⁰

Additionally, the reasoning above creates a false analogy between internal interactions among bodies of the same branch and external checks and balances regarding the separation of powers. If the position of the DOJ were correct, there would be little incentive for the President to come to an agreement with the Senate when he or she could much more easily unilaterally appoint whomever he or she preferred.

The Framers Intended the Recess Appointment Authority to Apply Only to Intersessional Recesses

⁴⁸ Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 *CARDOZO L. REV.* 377, 420 (2005).

⁴⁹ See 33 *Op. Att’y Gen.* 20, 23 (1921) (“[i]f the President’s power of appointment is to be defeated because the Senate takes an adjournment to a specified date, the painful and inevitable result will be measurably to prevent the exercise of governmental functions”).

⁵⁰ See S. REP. NO. 58-4389, at 2; 39 *CONG. REC.* 3823 (1905) (defining the recess term as the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress or in extraordinary session for the discharge of executive functions*) (emphasis in original).

The language of the clause itself again provides the answer to whether the Framers intended the appointment authority to extend to intra or intersession recesses. Even though the Framers apparently anticipated one intersession recess and possibly several intrasession recesses per year, they authored a clause providing for appointments during the *Recess*, instead of during the *Recesses*.⁵¹ The Framers' use of the singular term implies that they intended the recess appointment power to apply only to the type of recess of which there would be one each year: the intersession recess.⁵² The Framers' choice of the singular term "the Recess" carries even more weight when compared to the plural phrase "all Vacancies" in the Recess Appointments Clause.⁵³ The use of "Vacancies" in the very same clause suggests that the Framers intentionally chose the singular form of the term "Recess" rather than the plural.⁵⁴ If the Framers intended the clause to apply to both types of recesses, they could have written it so that the President could "fill all Vacancies during the Recesses or all Recesses."⁵⁵ If the Framers had intended a broader appointment authority, they would have used a term such as "adjournment" like they do under the Pocket Veto Clause.⁵⁶

Legislation Regarding the Appointments Clause

No legislation has yet been enacted which defines the presidential recess appointment authority. This is especially important because the Supreme Court stated that the presidential practice of filling vacancies occurring during the recess "has been sanctioned . . . by the

⁵¹ See Carrier, *supra* note 12, at 2218 (noting that the Framers anticipated intrasessional recesses to occur rarely based on their own experiences during the constitutional convention).

⁵² See *id.* at 2219 (explaining that the Framers anticipated the Senate would probably meet in one long, unbroken session each year due to the expense and difficulty of traveling across the country).

⁵³ See *id.*

⁵⁴ See U.S. CONST. art. II, § 2, cl. 3.

⁵⁵ See Carrier, *supra* note 12, at 2219 (writing that the Framers' choice of the definite article rather than the indefinite article further proves the Framers' intent that the term "recess" remain singular).

⁵⁶ See *id.* at 2221 (explaining that the Framers could have also given the President the power to use the recess appointment power by using a term which would apply to all recesses).

unbroken acquiescence of the senate.”⁵⁷ Thus, without legislation to the contrary, the weight of precedent will be on the side of expansive presidential appointment power.

The 1905 Judiciary Committee Report is Incomplete Because it Only Studied Whether Constructive Recesses Were Truly Recesses for Matters of the Recess Appointment Power

One of the most important pieces of legislative material regarding recess appointments was issued by the Senate Judiciary Committee in 1905.⁵⁸ However, this unique and important report did not distinguish intersession and intrasession recesses.⁵⁹ The Committee’s report did not consider the intersession-intrasession distinction because, at the time of the report, there had been only one documented intrasession recess appointment, made forty years earlier.⁶⁰ The committee was only concerned with the “constructive recess” because President Theodore Roosevelt attempted to construe the existence of a recess between the end of a special session of the Senate and the immediate commencement thereafter of a regular session of the Senate.⁶¹

Other Senate Resolutions Oppose Broad Authority for the President to use the Recess Appointment Power

Outside of the Senate committee report, a few Simple Resolutions have been introduced recently by the Senate.⁶² These acts have unanimously called for limitations, rather than

⁵⁷ See *In re Farrow*, 3 F. 112, 115 (N.D. Ga. 1880) (finding that the recess appointment power is justified as the practice of the executive branch and acquiescence of the Senate for over sixty years).

⁵⁸ See S. REP. NO. 58-4389, 39 CONG. REC. 3823, 3824 (1905).

⁵⁹ See *Carrier*, *supra* note 12, at 2229 (noting that the definition only distinguished between recesses during which the members of the Senate were dispersed throughout the country and the recesses that allegedly occurred in the split second between two consecutive sessions of the Senate).

⁶⁰ See *id.* (explaining the Senate committee only faced on type of abuse at the time, constructive recess).

⁶¹ See *id.* (noting that this action by President Roosevelt prompted the Senate to act to constrain his power).

⁶² See S. Res. 213, 99th Cong., 131 CONG. REC. 22,419 (1985) (suggesting limitation of recess appointments to intersession recess or to intrasession recess of at least thirty days); S. Res. 194, 99th Cong., 131 CONG. REC. 17,679 (1985) (enacted) (“[R]ecess appointments should not be made to the Board of Governors of the Federal Reserve System except under unusual circumstances and only for the purpose of fulfilling a demonstrable and urgent need in the administration of the Board’s activities”); and S. Res. 430, 98th Cong., 130 CONG. REC. 23,341 (1984) (limiting recess appointments to intersession recess or to intrasession recess of at least thirty days).

expansion or maintenance of the *status quo*, on the power of the President to issue recess appointments.⁶³ In the 1950s, after President Dwight Eisenhower made intersessional recess appointments to the Supreme Court, the Senate passed a sense-of-the-Senate resolution condemning such appointments.⁶⁴ Chief Justice Earl Warren and Justices Potter Stewart and William Brennan obtained such appointments before receiving permanent nominations and Senate confirmation.⁶⁵ The resolution may at least have had the effect of preventing other presidents from making recess appointments to the Supreme Court.⁶⁶

Additional Litigation on Validity of Recess Appointments is Scarce but Leaves the Door Open to Placing Limits on the Presidential Recess Appointment Power

In addition to *Allocco*, federal courts have rarely adjudicated other cases regarding recess appointments.⁶⁷ Incidentally, Senator Ted Kennedy has filed several *amicus curiae* briefs for these cases.⁶⁸ The most relevant for this discussion is *Evans v. Stephens*.⁶⁹ This case tested the legality of the intrasessional recess appointment of Bill Pryor to the federal bench.⁷⁰ The court held that the President may appoint judges during intrasessional recesses for vacancies occurring under an “exist theory.”⁷¹ However, the court left open the possibility that a more restrictive time limit, one which defines the minimum length of recess for which a president may appoint an

⁶³ *Id.*

⁶⁴ See S. Res. 334, 86th Cong., (1960), reprinted in S. REP. No. 86-1893, at 1-2 (1960).

⁶⁵ See Carrier, *supra* note 11, at 2247 (writing that, at the time of the appointments, Senator Byrd claimed support for a 30-day *de minimis* recess limit based on the Vacancies Act).

⁶⁶ *Id.*

⁶⁷ See T.J. Halstead, *Recess Appointments: A Legal Overview*, CRS REPORT FOR CONGRESS, July, 26, 2005, at CRS-7 (noting only three cases of note on the issue of recess appointment authority).

⁶⁸ See, e.g., Miller v. U.S., 2004 WL 1540107 (Appellate Petition, Motion and Filing) (U.S. July 07, 2004) Brief of Amicus Curiae Senator Edward M. Kennedy (No. 04-38) (arguing as a member of the Senate Judiciary Committee that intrasessional recesses are not recesses for purposes of the Appointments Clause).

⁶⁹ 387 F.3d 1220 (11th Cir. 2004) (cert. denied).

⁷⁰ See *id.* at 1221 (explaining that a defendant challenged the legality of Judge Pryor’s judgment against him based on the theory that he was illegally appointed to the federal bench during an intrasessional recess by President Bush).

⁷¹ See *id.* at 1226 (basing their decision to follow an “exist theory” based, in no small part, on the historical acquiescence of the Senate to such Presidential appointments).

interim judge, may be legislated.⁷² The court also noted that the question of whether this particular appointment circumvented, and showed an improper lack of deference to, the Senate's advice-and-consent role was a nonjusticiable political question.⁷³ The court concluded by leaving the solution to cases like this to the other two branches.⁷⁴

Recommendations

The Senate should clarify the ambiguities of the Recess Appointments Clause. Because a more restrictive reading of presidential power in this case is in accordance with the republican values installed by our Founders, this clause should be construed narrowly. Vacancies for which the President may use his recess appointment authority should be limited to vacancies that occur during an intersession recess.

Congress Should Distinguish Executive from Judicial Appointments in Order to Exercise More Authority Over the Judiciary to Ensure its Independence

The construct of separation of powers and the provisions of Article III supply a distinction between the judiciary and the executive branches; judges have life tenure, and their compensation cannot be diminished.⁷⁵ The same is not true of officials appointed to the executive branch. Since the recess appointment clause permits an exception to these rules safeguarding the independence of the judiciary, it might well deserve a narrower construction as applied to judges than as applied to executive officials.

⁷² See *id.* at 1225 (finding that the Constitution does not establish a minimum time for a recess to qualify and declining to answer that question in this case).

⁷³ See *id.* at 1227 (deciding that this matter was highly subjective and possible a basis for political action against the President, but not a matter for the courts).

⁷⁴ See *id.* (finding that the decision of how much deference the President owes to the Senate in this case is for Congress itself to decide).

⁷⁵ See U.S. CONST. art. III, § 1, cl. 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office").

The Senate should grant greater deference to recess appointments made to fill vacancies in the executive branch while holding firm on appointments to the judiciary. If the Senate advocates the independent nature of the judiciary, while picking its battles to bolster its arguments, the courts may be more likely to agree with the Senate's position. Also, should matters proceed to trial, the Senate would be wise to label any intrasessional judicial recess appointment as attempts to circumvent constitutional processes.

The Senate Should Ensure the Term “Recess” Only Applies to Intersessional Adjournment and not Intrasessional Breaks

The Senate, not the courts or President, should define what it means for that body to be in recess. It should be made clear through legislation, resolution, or other legal vehicle that the term “recess” only applies to intersession recesses and no other time. Evidence to distinguish intrasessional recess from total adjournment recess can be seen in the Senate rules regarding bill consideration.⁷⁶ The rules state: “A motion to proceed to the consideration of a bill does not expire when a recess is taken, but will be the pending business when the Senate reconvenes; if unacted upon, such a motion dies with an adjournment of the Senate.”⁷⁷ This rule shows how legislation is differently affected during the two forms of recess. In order to promote uniformity and protect the authority of the Senate, vacancy appointments should be treated in a similar fashion. Additionally, the pervasive use of the term “recess” means that other such periods now labeled “recess” may need to be redefined and renamed to avoid legal confusion. Offering such clarifying statements or legislation will serve as a counterbalance to the only other mounting

⁷⁶ See Senate Standing Rule 18 (providing the rules the Senate must follow when business is carried over from session to session).

⁷⁷ *Id.*

body of legal scholarship in the issue, that of the DOJ.⁷⁸ This clarifying legislation will help to convince courts that Congress does not intend to yield its authority to an expansive executive view of the recess appointment power.

Congress Can Use the Power of the Purse to Keep the Executive From Abusing the Recess Appointment Power

Short of voting on every nominee, thereby reducing vacancies and placing the constitutional impropriety of recess appointment on the President, the Senate could use the power of the purse to stem the flow of recess appointments. Currently, U.S. law provides that recess appointees cannot be paid if the vacancy arose before the recess.⁷⁹ There are three exceptions: if the vacancy arose less than thirty days before the end of a session; if the Senate rejected someone else for the job less than thirty days before the end of the session; or if the President nominated someone to fill the vacancy and the Senate did not act.⁸⁰ The law appears to provide further that, even if one of these exceptions applies, the appointee will not get paid if the President fails to re-nominate him within forty days of when the Senate reconvenes.⁸¹ Strengthening this law could make recess appointments a much less desirable position.

Additionally, Congress could put the brakes on the President's domestic agenda if he or she insists on making unnecessary recess appointments. One of the best ways to do this could be to alter the budget priorities of the President or deny funding to his or her favorite programs. Such an economics-based strategy plays to the strengths of Congress but is somewhat attenuated.

⁷⁸ See *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993).

⁷⁹ See 5 U.S.C. § 5503 (2000) ("Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate").

⁸⁰ *Id.*

⁸¹ See *id.* at (b) ("A nomination to fill a vacancy referred to by paragraph (1), (2), or (3) of subsection (a) of this section shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate").

More importantly, it does little to address the root of the problem and leaves open the possibility of future recess appointment showdowns.

Parliamentary Options

Use of the so-called “Tillman Adjournment” would basically allow the Senate a parliamentary option to rid themselves of unwanted recess appointments.⁸² In essence, after an undesirable recess appointment was made, the Senate could end its session, then instantly reconvene, then adjourn again.⁸³ However, while no court could stop this process, it would be a constitutional impropriety.⁸⁴ Also, the Constitution provides, and uniform historical practice confirms, that a regular session ends when the Senate and House agree that it ends, and it would be difficult to get the House to agree to such actions.⁸⁵ Finally, nothing could stop the President from simply making more recess appointments at every adjournment or even convening special sessions of the Senate as punishment.⁸⁶ A more practical alternative may be to place a hold on *all* nominations until the President acquiesces to providing notice.⁸⁷ The Senate may also convene every three days for a *pro forma* session during which time just a few senators will

⁸² See Seth Barrett Tillman, *Senate Termination of Presidential Recess Appointments*, 101 NW. U. L. REV. COLLOQUY 82 (2007), available at <http://www.law.northwestern.edu/lawreview/colloquy/2007/2/> (last visited May 20, 2009); Brian C. Kalt, *Keeping Recess Appointments in Their Place*, 101 NW. U. L. REV. COLLOQUY 88 (2007), available at <http://www.law.northwestern.edu/lawreview/colloquy/2007/3/> (last visited November 27, 2007).

⁸³ See *id.*

⁸⁴ See *id.* (writing that a Tillman Adjournment would probably not be struck down by a court as unconstitutional, but is nevertheless inconsistent with the Constitution).


⁸⁵ See *id.* (arguing that the Senate alone cannot unilaterally end a session of Congress).

⁸⁶ See *id.* (explaining that, for every adjournment by the Senate, the President could recess appoint, then reconvene the Senate again with no congressional recourse except for impeachment).

⁸⁷ See S. Res. 244, 107th Cong., (2002) (explaining that any senator may approach the leadership and announce his or her objection to bringing a certain bill or nominee to the floor, thus effectively preventing the leadership from so doing).

remain in town and open the Senate for debate then immediately close it.⁸⁸ However, this tactic, while effective and painless, does not address the true underlying constitutional concerns.

Conclusion

The President's judicial appointments will be of paramount importance for several reasons. Unchecked recess appointment power will allow the President to appoint judges based on short-term political gain for placating the political base or highlighting the opposition as obstructionists, rather than the best interest of the country. Also, although recess appointments expire at the end of the next session, once a judge is in the seat, it becomes much easier to stay there and much harder to be dislodged.⁸⁹ Desire to avoid future confrontation or a change of power in the Senate can turn a temporary appointment into a lifetime one. A judge with a lifetime appointment can continue the President's liberal or conservative legacy far beyond his presidency in a way other executive appointments cannot. History shows that presidents will likely have little compunction whatsoever about using a broad interpretation of the Recess Appointments Clause to allow them to appoint judges as they sees fit.⁹⁰ It is likely what will happen time and again, unless legislation limiting the recess appointment power is produced. 

⁸⁸ See Daniel Schorr, 'Pro Forma' Session a Block on Bush, ALL THINGS CONSIDERED [Radio News Analysis], Nat'l Pub. Radio, November 19, 2007 available at <http://www.npr.org/templates/story/story.php?storyId=16435555> (explaining that the Senate will convene a series of sessions in an attempt to thwart any recess appointments by the President, including appointments to the Federal Election Commission and National Labor Relations Board).

⁸⁹ See William H. Pryor, Jr. at the *Biographical Directory of Federal Judges*, a public domain publication of the Federal Judicial Center available at <http://www.fjc.gov/servlet/tGetInfo?jid=3050> (last visited March 31, 2009) (noting that Judge Pryor, a recess appointee, was subsequently confirmed to a lifetime appointment on the Eleventh Circuit).

⁹⁰ See *id.* (noting that President Bush is on pace to set the record for the number of recess appointments made by any president).