ANTICIPATED JUDICIAL VACANCIES AND THE POWER TO NOMINATE

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INTRODUCTION

ON July 1, 2005, Justice Sandra Day O'Connor sent a letter to President George W. Bush announcing her retirement from active service on the Supreme Court of the United States. In her letter, Justice O'Connor indicated that her departure would not be

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immediate, however, and instead would be only "effective upon the nomination and confirmation of [her] successor."[1] For seven months, Justice O'Connor remained an active member of the Court while President Bush formally nominated three individuals to fill her seat. Bush first nominated then-Judge John G. Roberts and then, upon Judge Roberts's subsequent nomination to the center chair following Chief Justice William H. Rehnquist's death, the President nominated White House Counsel Harriet G. Miers and lastly nominated then-Judge Samuel A. Alito.[2] While the Senate considered the nomination of now-Justice Alito and provided its advice and consent in favor of his appointment, Justice O'Connor continued active service on the Court. In fact, weeks after President Bush nominated Alito, and just eight days before his final confirmation by the Senate, Justice O'Connor provided the crucial fifth vote in a closely divided sovereign immunity case.[3]

As a matter of historical practice, the form of Justice O'Connor's retirement and her continued presence on the Court during the nomination and confirmation process were rare, but not unique. The manner in which Justice O'Connor retired raises important constitutional questions about the conditions that trigger the elaborate process mandated by the Appointments Clause of the U.S. Constitution.[4] Despite intense scholarly and judicial interest in

[1] Letter from Justice Sandra Day O'Connor to President George W. Bush (July 1, 2005), http://www.supremecourtus.gov/publicinfo/press/oconnor070105.pdf.

[2] Denis Steven Rutkus & Maureen Bearden, Cong. Research Serv., Supreme Court Nominations, 1789–2005: Actions by the Senate, the Judiciary Committee, and the President 40 (2006). The Senate received Judge Roberts's nomination on July 29, 2005. It was withdrawn on September 6 when the President nominated Judge Roberts to be the Chief Justice of the United States. The Senate received Miers's nomination on October 7, and it was withdrawn by the President on October 28. Finally, the President nominated Judge Alito on November 10. Id.

[3] See Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006). The Senate Judiciary Committee voted to recommend Judge Alito for confirmation the very day after the opinion was issued, following a one-week delay requested by Senate Democrats. Justice O'Connor issued her final opinion, for a unanimous Court, in a much-anticipated abortion case on January 18, 2006, also after the conclusion of the Committee's hearings on the Alito nomination but prior to final confirmation by the full Senate. See Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006).

[4] The form of Justice O'Connor's retirement touched off brief discussion confined, mainly, to the legal blogosphere. See, e.g., Posting of Armen Adzhemyan to De Novo, http://www.blogdenovo.org/archives/2005_07.html (July 1, 2005, 22:23 EDT); Posting of Matthew J. Franck to Bench Memos, http://bench.nationalreview.com/post/?q=YzQ1N2ExNzBmMTlmODcwZWY5MTUzMDY0NzM2OGM2MTc= (July

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the Appointments Clause, such questions have never been analyzed.

This Note has two goals. First, this Note seeks to develop an understanding of the conditions that trigger the Appointments Clause process. It will argue that the President's power to nominate—the first step of that process—is triggered by the existence of a vacancy in an office to be filled by the appointment of an officer of the United States. This vacancy prerequisite is generally quite broad, however, as a matter of constitutional understanding and historical practice. It often, but not always, includes what can be called anticipated vacancies—offices that will be vacant in the future. When a Secretary of Defense announces that he will retire on a future date, for example, the vacancy prerequisite is satisfied not by the mere announcement, but because the President always has the power to remove such an officer at will and historically has been permitted to effectuate such a removal through a new appointment. This Note will argue that the Appointments Clause places important limits, however, on the President's power to nominate an individual to an anticipated vacancy in that a future vacancy must be definite and irrevocable in order to commence the appointments process required by Article II.

Second, this Note will advance the unique argument that, despite occasional practice to the contrary, the President's power to nominate and the Senate's authority to provide its advice and consent are not triggered by an Article III judge's announced intention to retire on some future date or contingency. A judge who offers to retire on a specified date in the future, or upon a contingency such as the confirmation, appointment, or qualification of a successor, does not make a definite and irrevocable break with his office that is sufficient to trigger the power to nominate a successor. Because Article III judges serve with life tenure, presidential nomination and Senate confirmation upon anticipated judicial vacancies raise multiple constitutional concerns. First, a judge may decide to withdraw the retirement before it becomes effective—potentially exer-

22, 2005, 18:29 EDT); Posting of Saul Levmore to The University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2005/week44/index.html (Nov. 1, 2005, 10:50 CST); Posting of Jim Lindgren to The Volokh Conspiracy, http://volokh.com/archives/archive_2005_07_17-2005_07_23.shtml (July 23, 2005, 18:20 EDT).

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cising an "incumbent's veto" over a nominated successor. Second, the continuing service of the incumbent judge until his successor is confirmed, appointed, or qualified changes the dynamics of the Senate's advice and consent by enticing Senators to delay or deny consent to a presidential nomination where they would prefer continuing service by the sitting judge. Third, vacancies contingent upon the discretionary events in the appointments process permit the political branches to set the precise time that an Article III judge departs the bench—in tension with the principles of separation of powers and judicial independence. Finally, anticipated vacancies allow judges to serve, essentially, as irremovable "holdover" judges after signaling their departure from the bench, which in some circumstances may frustrate the intended operation of the Recess Appointments Clause.

Part I will briefly discuss the history and role of the Appointments Clause within the larger constitutional scheme—emphasizing the structural importance of the appointing process both at the framing and today. Part II will fill an important gap in the Appointments Clause literature by arguing that the power to nominate found in the Appointments Clause is triggered by the existence of a vacancy in a federal office that must be filled by an officer of the United States. Part III will then argue that, because Article III judges enjoy life tenure, their anticipated retirement is insufficient to satisfy the vacancy prerequisite developed in Part II.

This Note will conclude by briefly addressing the practical implications of this argument for the political leaders who have a role in the appointments process. It argues that the next time a Supreme Court Justice announces his intention to retire on a future date or contingent upon the confirmation, appointment, or qualification of a successor, legal scholars should pause when media pundits immediately launch into speculation about who the President will nominate. The first question should not concern who the President will nominate, but whether he has the constitutional power to nominate someone at all.

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I. THE APPOINTMENTS CLAUSE IN THE CONSTITUTIONAL SCHEME

The text of Article II, Section 2, Clause 2 of the U.S. Constitution is deceptively simple:[5]

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .[6]

This seemingly straightforward articulation of the formal process for staffing the highest offices in the federal government was, however, the subject of substantial consideration at the Constitutional Convention and subsequent ratification debates; in these few phrases the Framers left myriad interpretive issues. This Part places those interpretive issues in their historical and structural context in order to highlight the Constitution's drafters' careful consideration of the appointing power and their anticipation that its exercise would perpetuate the separation of powers they envisioned.

Both jurists and scholars have long suffered from an "obsession with appointment and removal."[7] At least arguably, the most popular target of this obsession is the Senate's provision of its "Advice and Consent," with reams now written about the role and function of the Senate in the appointments process.[8] Judges and commenta-

[5] See Henry J. Abraham, Justices and Presidents: A Political History of Appointments to the Supreme Court 24 (3d ed. 1992) ("No mystery, confusion, or double entendre obtains with respect to the intention of the Founding Fathers regarding the agreed-on language of the Constitution's Article II . . . . It is in fact crystal clear . . . ."); Theodore Y. Blumoff, Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court, 73 Iowa L. Rev. 1079, 1085 (1988) ("The appointment clause is a relatively straightforward and unambiguous provision. Its historical development, by and large, reflects its text.").

[6] U.S. Const. art. II, § 2, cl. 2.

[7] M. Elizabeth Magill, The Revolution that Wasn't, 99 Nw. U. L. Rev. 47, 61 (2004).

[8] See Albert Yoon, Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869–2002, 8 Am. L. & Econ. Rev. 143, 148 (2006) (noting that existing scholarship has "directed [its] attention primarily to the confirmation process for the Supreme Court"). The canonical treatment of the Senate's role remains Joseph P. Harris, The Advice and Consent of the Senate (1968). See also Lee Epstein & Jeffrey A. Segal, Advice and Consent: The Politics of Judicial Appointments (2005); Mark

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tors have also devoted much ink to the elusive definition of the "Officers of the United States" to which the dictates of the Appointments Clause apply.[9]

Surprisingly unexamined, however, is what triggers the formal process required by the Appointments Clause. The three words that lie at the outset of the Clause—"he shall nominate"—are rarely the subject of our attention.[10] The Constitution clearly confers the power to nominate upon the President but appears silent as to *when* "he shall nominate." This interpretive gap is particularly vexing in light of the significance of that text in the scheme of separated powers and the importance attributed to the precise process of federal appointments at the time of the framing.

The Framers of the Constitution arrived in Philadelphia well-versed in the historical abuse of appointments to governmental office in England, the colonies, and their own fledgling states.[11] It was widely recognized that carefully constructing an appointments process would be an important purpose of the Constitutional Convention and critical to the success of the government to be established there.[12]

Early proposals placed the appointing power either in an unchecked Executive or solely within the purview of the Senate.[13] The

Silverstein, Judicious Choices: The New Politics of Supreme Court Confirmations (1994).

[9] See, e.g., Freytag v. Comm'r, 501 U.S. 868 (1991); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); Landry v. FDIC, 204 F.3d 1125 (D.C. Cir. 2000).

[10] One exception is occasional consideration of what external constraints other constitutional actors can place upon the President's consideration of potential nominees. See, e.g., Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 466 (1989) (noting the "formidable constitutional difficulties" of applying disclosure requirements of the Federal Advisory Committee Act to the President's prenomination consultations).

[11] See Weiss v. United States, 510 U.S. 163, 184 (1994) (Souter, J., concurring); Charles E. Morganston, The Appointing and Removal Power of the President of the United States 5 (Greenwood Press 1976) (1929); Blumoff, supra note 5, at 1091. Most delegates came to Philadelphia with some recognition that appointment by state assemblies had become the "principal source of division and faction" in those early state governments. Gordon S. Wood, The Creation of the American Republic 1776–1787, at 407 (1969); see also id. at 435, 452, 551–52.

[12] Cf. Joseph Story, A Familiar Exposition of the Constitution of the United States 173 (Legal Classics Library 1992) (1840) (calling the appointment power "one of the most important and delicate in a republican government").

[13] For example, the Virginia Plan, proposed as a set of resolutions by William Randolph and from which the Constitutional Convention delegates began their work, called for a national judiciary to be chosen by the national legislature. 1 The Records

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final product—the text of Article II, Section 2, Clause 2—was the result of considerable compromise.[14] In fact, a similar proposal had been rejected by the delegates before their final adoption of the now-familiar phrasing.[15] Somewhat surprisingly, given the substantial attention devoted to the appointments process during the preceding debates, agreement to the final language provoked very little recorded comment, and the exact meaning of its key terms escaped recorded consideration.[16]

The Appointments Clause figured prominently in the ratification debates. Proponents hinged their hopes in the success of the federal government on the process of appointing its new officers, just as critics rested their fears of the new central authority on precisely the same process. Anti-federalists pointed to the sharing of appointment responsibilities between the President and the Senate as a potential wellspring of corruption, intrigue, abuse, and despotism.[17] Federalists countered that the system of nomination and confirmation would "produce all the good" of solely presidential appointment, but "without the ill."[18] The careful allocation of appointing powers between the President and the Senate was intended, therefore, to serve as a structural check that would permit the discernment of superior candidates for appointment, balance

of the Federal Convention of 1787, at 20–21 (Max Farrand ed., 1966). The New Jersey Plan, proposed a couple of weeks later, provided instead for the appointment of judges by the Executive. Id. at 244.

[14] Blumoff, supra note 5, at 1093 ("The framers compromised on the appointment prerogative."). Professor Blumoff has called the Appointments Clause "a contingent fact of history" and "a bastard child" born out of "partisan politics and unguided practical necessity." Theodore Y. Blumoff, Separation of Powers and the Origins of the Appointment Clause, 37 Syracuse L. Rev. 1037, 1041, 1078 (1987).

[15] On July 18, 1787, delegate Nathaniel Gorham of Massachusetts suggested that the judges of the Supreme Court be appointed as they were in his home state: appointment by the Executive with the advice and consent of the upper chamber of the legislature. His motion was defeated on a 4-4 vote among the state delegations. 2 The Records of the Federal Convention of 1787, at 38 (Max Farrand ed., 1966). Three days later, the delegates rejected James Madison's similar proposal for executive appointment with a Senate veto and instead voted, six states to three, to empower the Senate acting alone to appoint the Supreme Court. Id. at 71–72.

[16] See Harris, supra note 8, at 33.

[17] See The Federalist No. 76, at 456 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that critics "contend that the President ought solely to have been authorized to make the appointments under the federal government").

[18] The Federalist No. 77 (Alexander Hamilton), supra note 17, at 460.

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national and state interests, and guard against the unrestrained exercise of executive power.

Much of the contemporary appointments process developed from its early practice. Presidents Washington and Adams were particularly concerned with maintaining the clear separation of responsibilities among the Executive and Senate in appointing federal officers. Washington and the first Senate instituted the practice of making nominations and providing advice and consent by written message, for example, and justified that formality by the need to delineate clearly the responsibilities of distinct constitutional actors in the appointing process.[19] Modern Presidents still distinguish between the "announcement of intention to nominate" and the actual nomination, made official only upon its transmission to the Senate.[20]

To further ensure the dominant role of the Executive in the nomination process, early Presidents vigorously safeguarded their prerogative of nomination. In an oft-cited response to the Senate's rejection of an early nomination, President Washington stated that "as *the President has a right to nominate without assigning his reasons*, so has the Senate a right to dissent without giving theirs."[21] President Adams also drew a bright line by refusing to receive a

[19] President Washington, characteristically concerned about the precedential effect of his actions, carefully considered this precise practice. He wrote at the time that:

> My present Ideas are that as [nominations] point to a single object unconnected in its nature with any other object, they had best be made by written messages. In this case the Acts of the President, and the Acts of the Senate will stand upon clear, distinct and responsible ground.

30 The Writings of George Washington from the Original Manuscript Sources 1745–1799, at 374 (John C. Fitzpatrick ed., 1939); see also Harris, supra note 8, at 38–39.

[20] See, e.g., Press Release, Office of the Press Secretary, President George W. Bush Today Announced the Recess Appointment of Six Individuals (Aug. 6, 2002), available at http://www.whitehouse.gov/news/releases/2002/08/print/20020806-7.html (listing the dates of both the announcement of intention to nominate and the formal nomination to the Senate for each individual). The subtle distinction is often lost on journalists, who report the President's announcement of the intention to nominate an individual as the nomination itself. See, e.g., Joseph Curl, Bush picks Alito for Supreme Court, Wash. Times, Nov. 1, 2005, at A1 (announcing that "President Bush yesterday nominated Judge Samuel A. Alito Jr.," even though Alito's nomination would not be sent to the Senate until November 10).

[21] The Writings of George Washington from the Original Manuscript Sources 1745–1799, supra note 19, at 374 (emphasis added); see also Harris, supra note 8, at 39.

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committee of Senators that sought to confer with him on a coming nomination.[22]

The precise structure of the appointments process was of such importance to the fledgling federal government that it would form the underlying dispute in that most canonical of early constitutional cases, *Marbury v. Madison*.[23] Known best for establishing the principle of judicial review,[24] the case revolved around the appointment and commissioning of William Marbury as a justice of peace for the District of Columbia.[25] In addressing whether Marbury had a vested right to his commission, Chief Justice Marshall noted that the Appointments and Commission Clauses "seem to contemplate three distinct operations:"[26] first, the President's "sole" and "voluntary" act of nomination; second, the appointment "performed by and with the advice and consent of the senate"; and third, the commission.[27] The Court's finding that Marbury was entitled to his commission rested, in large part, on the precise "constitutional distinction" between these stages of the appointing process.[28]

Early recognition of this constitutional distinction by the framing generation laid the foundation for employing it as an important structural check in the scheme of federal government; the precise form and function of the appointments process (and its corollary, removal) has ever since been the locus of substantial controversy

[22] Harris, supra note 8, at 45–46. Some scholars argue, despite this historical evidence, that the Senate retains a "constitutional role as prenomination advisors." Laura T. Gorjanc, Comment, The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent, 54 Case W. Res. L. Rev. 1435, 1437 (2004); see also Edward M. Kennedy, Op-Ed., Let the Senate Advise, Wash. Post, July 4, 2005, at A17 (arguing shortly after Justice O'Connor's retirement that "taking seriously the 'advice' part of 'advice and consent'" means "sharing the names of prospective nominees").

[23] 5 U.S. (1 Cranch) 137 (1803).

[24] Id. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

[25] Id. at 137–38.

[26] Id. at 155; Edward S. Corwin, The President as Administrative Chief, 1 J. Pol. 17, 25 (1939) ("The Constitution distinguishes three stages in appointments by the President with the advice and consent of the Senate.").

[27] *Marbury*, 5 U.S. (1 Cranch) at 155–56.

[28] Id. at 156, 162. Specifically, the Court held that the delivery of a commission was merely a ministerial act such that, once appointed by the President, William Marbury had vested rights to his commission. Id. at 158, 162.

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over the form and function of the separation of powers.[29] The formal process required to appoint an officer of the United States serves as one means by which the Framers "textually committed the nation to checks and balances,"[30] and—particularly in the case of judicial appointments—serves to protect individual rights and liberties through a constitutional structure that resists individual "encroachments" and "majoritarian impulses."[31]

II. TRIGGERING THE POWER TO NOMINATE

The critical importance of the Appointments Clause to the constitutional structure of the federal government invites consideration of the conditions that trigger the President's ability to commence the appointing process through the nomination of an individual to serve as an officer of the United States. This Part seeks to develop an understanding of the power to nominate and argues that the existence of a vacancy to be filled is a necessary condition precedent to the exercise of the nominating power. This vacancy prerequisite is considerably broad and includes both actual and anticipated vacancies, provided that they are sufficiently definite and irrevocable. These requirements of definiteness and irrevocability pose unique challenges in the case of judicial retirement, to which this Note will then turn.

[29] See, e.g., Morrison v. Olson, 487 U.S. 654, 696–97 (1988); Bowsher v. Synar, 478 U.S. 714, 722–23 (1986); Buckley v. Valeo, 424 U.S. 1, 127–30 (1976) (per curiam); Myers v. United States, 272 U.S. 52, 117–21 (1926).

[30] Blumoff, supra note 5, at 1082; see also Edmond v. United States, 520 U.S. 651, 659 (1997) ("[T]he Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." (quoting *Buckley*, 424 U.S. at 125)).

[31] Blumoff, supra note 14, at 1058–59 (quoting The Federalist No. 48, at 313 (James Madison)); see also Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring) ("It remains one of the most vital functions of this Court to police with care the separation of the governing powers. . . . When structure fails, liberty is always in peril."); David S. Law, Generic Constitutional Law, 89 Minn. L. Rev. 652, 739 (2005) ("The power of the President to nominate federal judges, and the Senate's powers of advice and consent, are mechanisms that ensure the composition of the bench reflects the dominant forces of American political life.").

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A. The Power to Nominate

The text of the Appointments Clause makes clear that an individual cannot exercise the authority of a principal officer of the United States without nomination by the President followed by appointment with the Senate's advice and consent.[32] The Clause vests the power to commence this appointments process in the President, indicating that "he shall nominate" an individual to serve as such an officer.[33]

This power to nominate, then, is an enumerated presidential responsibility—it is exclusive, and neither the Senate nor any other government actor can originate the appointment of a principal officer of the United States.[34] The President's choice of a nominee is virtually boundless, with only minor exceptions.[35] His exclusive and nearly limitless authority to nominate an individual for one of the highest offices in the federal government, setting into motion the formal process leading to that individual's appointment, suggests a need to consider carefully when that power can be employed.

[32] U.S. Const. art. II, § 2, cl. 2. Congress is, however, empowered by the Constitution to vest the appointment of "inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments." Id. Distinguishing between principal and inferior officers has long been problematic. See, e.g., *Morrison*, 487 U.S. at 670–71.

[33] U.S. Const. art. II, § 2, cl. 2.

[34] See 3 Op. Att'y Gen. 188, 188–89 (1837); Harris, supra note 8, at 33–34; Michael M. Gallagher, Disarming the Confirmation Process, 50 Clev. St. L. Rev. 513, 520–21, 543 (2002–03).

[35] In fact, the only such exception to the President's power to nominate is found in the Incompatibility Clause. U.S. Const. art. I, § 6, cl. 2. Justice Kennedy points to this as a limitation on the President's power to nominate in his *Public Citizen* concurrence. 491 U.S. at 484. The Incompatibility Clause is not viewed, then, as merely a limit on appointment, but also as a limit upon the exercise of the power of nomination. President Washington so recognized in informing the Senate on February 28, 1793, that his nomination of William Patterson to serve as an Associate Justice of the Supreme Court was "null by the Constitution" because Patterson's term as a Senator would not expire until March 3, 1793. 1 The Documentary History of the Supreme Court of the United States, 1789–1800, at 90 (Maeva Marcus & James R. Perry eds., 1985). Patterson was renominated four days later, on March 4, 1793, once his term in the Senate had expired. Id. For another example, see Edward S. Corwin, The President: Office and Powers, 1787–1984, at 87–88 (Randall W. Bland et al. eds., 5th rev. ed. 1984) (discussing the appointment of then-Senator Hugo Black to the Supreme Court).

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B. Triggering Nomination: The Vacancy Prerequisite

The President cannot appoint an individual to an office that is not vacant where he does not have the power to remove the incumbent officeholder. The threshold requirement for the appointment of an officer is that it be made to an existing office.[36] In contrast with the system of royal prerogative—in which the King both created the office and named the officer through his appointment—the concept of an "office" as being distinct from its holder and enduring from officer to officer had emerged before the founding and is presupposed by the Appointments Clause.[37] Additionally, many officers of the United States are protected from usurpation by new appointment—federal judges are so protected by the Constitution,[38] and certain members of independent agencies and commissions are so protected by statute.[39]

Though perhaps less obvious, the President is similarly powerless to make prospective appointments. The President cannot, for example, appoint an individual to be the Chief Justice of the United States whenever that position should become vacant—no matter how distant in time that vacancy may occur (or who is serving as President at the time). Instead, a President may only appoint to fill the vacancies that are currently before him during his stewardship of the federal government.

The President is not empowered to nominate, nor the Senate authorized to provide advice and consent, absent a vacancy. The Framers envisioned a single appointing power that embraced three distinct functions in order to provide for shared responsibility

[36] Corwin, supra note 26, at 18 (citing United States v. Maurice, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747); 5 Op. Att'y Gen. 88 (1849); 10 Op. Att'y Gen. 11 (1861); 18 Op. Att'y Gen. 171 (1885)).

[37] See id. at 17.

[38] U.S. Const. art III, § 1.

[39] For just one of the numerous examples, see 12 U.S.C. § 241 (2000), which prescribes the appointment of members of the Board of Governors of the Federal Reserve to fourteen-year terms. See also Wiener v. United States, 357 U.S. 349, 356 (1958) (holding that the President could not remove a member of the War Claims Commission without cause); Borders v. Reagan, 518 F. Supp. 250, 268 (D.D.C. 1981) (holding that the President could not remove, without cause, a member of the District of Columbia Judicial Nominating Commission who had not completed his five-year statutory term), vacated as moot, 732 F.2d 181 (D.C. Cir. 1984).

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among the branches.[40] The power to nominate is one of the enumerated steps in the appointments process; it is a legal function that, along with the Senate's advice and consent, must precede the effective appointment of a principal officer of the United States. The term "nominate" in Article II, therefore, is a constitutional term of art and not merely a suggestion that the President announce from time to time the names of strong candidates for unavailable positions.

A nomination, without a vacancy to which to appoint, is a constitutional nullity. Just as the President cannot make prospective appointments, if the President were to "nominate" an individual to serve as Chief Justice of the United States, for example, without receiving any indication that the current Chief Justice had any intention to vacate his life-tenured seat, that "nomination" would have no legal effect. And should a new President wish to see a trusted advisor at the helm of the nation's monetary policy, there are many political tools he can employ to entice the incumbent Chairman of the Federal Reserve to step aside—but sending an official nomination of a successor to the Senate for its advice and consent is not an option. To argue otherwise is to argue also that the Senate may provide its advice and consent to those "nominees" even when the incumbent officeholder has no intention of departing the office. This view necessarily permits the President to "prenominate" and the Senate to "preconfirm" individuals for offices that are not vacant, and then for the President to appoint any prenominated, preconfirmed individual once the office becomes available. Imagine a President and Senate arranging to nominate and confirm twenty individuals for each of the various Courts of Appeals, thus permitting the President to appoint from those lists whenever a sitting judge on those courts departed active service. Such a hypothetical maneuver would be deeply inconsistent with the constitutional appointments process and demonstrates why the

[40] Constitutional Convention delegates debated whether a unitary appointing power should be lodged in the Executive or in the Senate. They finally compromised on sharing the appointing power between the two by apportioning the distinct appointing functions. See supra notes 13–16 and accompanying text.

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existence of a vacancy is a condition precedent to commencing the appointments process through nomination.[41]

That this vacancy prerequisite applies across the entire appointing process can be deduced from indications in the Clause's text: the imposition of a duty to nominate and the wording of the Recess Appointments Clause. First, there is a textual indication that exercise of the power to nominate requires a vacancy. Nomination is more than a presidential power—it is articulated in the Constitution as a *duty*.[42] The Appointments Clause reads that the President *shall* nominate, not merely that he *may* nominate.[43] Certainly the President is under no duty to nominate individuals to serve in offices currently occupied, but where an office established by the Constitution or law becomes vacant, it triggers a presidential obligation to fill up that office by nomination and appointment. While the duties to nominate and appoint are not susceptible to judicial enforcement,[44] the text itself indicates that some event or condition—which this Note calls a vacancy—creates a constitutional compulsion for presidential action.

[41] Cf. In re Prod. Steel, 48 B.R. 841, 849 (M.D. Tenn. 1985) (noting that as "there was no gap in the incumbency of the bankruptcy judges or of the bankruptcy courts[,] . . . the Appointments Clause of Article II *has not been triggered because no vacancy occurred*" (emphasis added)). The intuition that vacancies necessarily precede nominations finds expression in how appointees and scholars discuss nominations. See, e.g., Ruth Bader Ginsburg, Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate, 1988 U. Ill. L. Rev. 101, 101 ("In June 1980, when my nomination *for a D.C. Circuit vacancy* was pending . . . ." (emphasis added)); Carl Tobias, Federal Judicial Selection in a Time of Divided Government, 47 Emory L.J. 527, 533 (1998) (referring to "[t]he period between vacancy and nomination").

[42] See, e.g., Abraham, supra note 5, at 24 ("[The Appointments Clause] means exactly what it says: it is the president's duty and responsibility to find and *nominate* candidates . . . .").

[43] U.S. Const. art. II, § 2, cl. 2; see also Corwin, supra note 26, at 24 ("[The appointment power] involves ordinarily no choice whether there shall be an appointment. Just as it is expected that a legally authorized appropriation will be spent, so it is expected that a legally authorized office will be filled.").

[44] *Marbury v. Madison* planted the seeds of what is today called the political question doctrine by indicating that "[t]he power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion." 5 U.S. (1 Cranch) 137, 167 (1803). That a particular constitutional norm cannot be judicially enforced does not, however, negate its role as a governing norm that officials must follow. See Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1226 (1978).

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The Recess Appointments Clause also reflects the Framers' intent that a vacancy be a prerequisite to the exercise of the power to nominate. The Recess Appointments Clause modifies and supplements the general Appointments Clause;[45] the former immediately follows the latter and states that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate" by granting temporary commissions.[46] Text triggered by "Vacancies" that "happen during the Recess of the Senate" presupposes that the immediately preceding text is triggered by all other vacancies. The Framers created a process to fill *vacancies* through nomination, advice and consent, and appointment, and the provision for recess appointments supplements this process for the particular circumstance where such vacancies "happen" during the Senate's recess. The Recess Appointments Clause also says that the President "shall have the Power" to make recess appointments—not that he *must* do so. The issuance of temporary commissions during a recess of the Senate is thus an optional supplement to the President's duty to make nominations upon vacancies that "happen" when the Senate is in session.

C. Actual and Anticipated Vacancies

Accepting that some vacancy prerequisite exists for the exercise of the President's power to nominate leaves the task of defining the sort of "vacancy" that is sufficient to trigger the formal appointments process. This vacancy prerequisite need not be—and, in fact, is not—an overly restrictive one. It does not, in every circumstance, literally require the existence of a fully vacated opening in the federal government. Instead, the structure of the appointments proc-

[45] See Steven M. Pyser, Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent, 8 U. Pa. J. Const. L. 61, 64 (2006) (noting that "[h]istorical evidence indicates that the Recess Appointments Clause was intended as a supplementary procedure"). For example, in *United States v. Corson*, the Court held that when President Lincoln dismissed a military officer, he created a vacancy that could only be filled by appointment by and with the advice and consent of the Senate or, if that vacancy occurred during a Senate recess, by temporary commission. 114 U.S. 619, 622 (1885). The Court, therefore, recognized a vacancy triggering the formal appointments process and noted, secondarily, that the Recess Appointment Clause provisions could also be triggered if that vacancy "occurred" during a recess. Id.

[46] U.S. Const. art. II, § 2, cl. 3.

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ess permits the President some latitude in creating or anticipating vacancies and in making preemptive nominations.[47] That latitude does not extend, as argued above, to making "nominations" where the President has no certainty that an office is, or will shortly become, vacant. The President's power to nominate is triggered, then, by an actual or anticipated vacancy that is sufficiently definite and irrevocable.

1. Actual Vacancies

Actual vacancies in an existing office most obviously trigger the President's power to nominate an individual for appointment. Such a vacancy can be created through the death of an officeholder, through her immediate resignation or retirement, by her removal from office, due to an appointee's declination of office,[48] or through the creation of a new office by law.[49] In addition, Congress can establish an unlimited number of offices of a certain kind and permit, in effect, a limitless number of actual vacancies for presidential nomination and appointment.[50]

[47] See, e.g., Memorandum of July 11, 1968, *reprinted in* 3 Op. Off. Legal Counsel 152, 158 (1979) ("There is no indication . . . that a *matured* vacancy is a necessary prerequisite. Nomination and confirmation to fill anticipated vacancies are consistent with the constitutional plan, and have been frequent occurrences in our history." (emphasis added)). The Office of Legal Counsel wrote this memorandum in the context of Chief Justice Warren's contingent retirement from the Court, attempting to develop legal arguments to justify President Johnson's nomination of a successor while Chief Justice Warren continued to serve. See id.

[48] Although a rare occurrence today, declination of appointed office was a relatively common occurrence in the earliest days of the Republic due to burdens of travel and difficulties of communication. President Washington, for example, appointed individuals to the Supreme Court who, when presented with their commission, declined to serve. See Rutkus & Bearden, supra note 2, at 19, 20 (noting that Robert Harrison declined to serve on the Court and that Justice William Cushing declined elevation to Chief Justice); see also id. at 20 (John Jay); id. at 21 (Levi Lincoln and John Quincy Adams); id. at 23 (William Smith); id. at 28 (Roscoe Conkling).

[49] See, e.g., Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 202(a), 203(a), 104 Stat. 5089, 5098–100 (creating eleven new circuit court judgeships and sixty-one district court judgeships) (codified as amended at 28 U.S.C. §§ 44, 133 (2000)).

[50] Corwin, supra note 35, at 87 (noting that "Congress has on a few occasions endowed the President with its own power to establish offices and has merged therewith the full power to appoint to such offices; that is, without consulting the Senate" and pointing to various New Deal programs as an example).

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In at least two circumstances, actual vacancies can exist even while an officer continues to perform the functions of the office. First, the President has the power to make temporary designations of "acting" executive branch officials to ensure the continuity of important government operation during an actual vacancy in an office. Congress has long regulated this practice, most recently by setting limits on the tenure of acting officials in the Federal Vacancies Reform Act of 1998.[51] Second, the statutes governing many independent agencies and commissions permit their term-limited officeholders to remain in place as "holdovers" until the appointment and qualification of a successor.[52] The actual vacancy is created by the expiration of the statutory term, however, and nonetheless triggers the President's power to nominate.

2. Anticipated Vacancies

It is useful to consider anticipated vacancies in two groups.[53] First, there are those vacancies anticipated on a future date certain. Second, there are those anticipated vacancies that are contingent on the happening of some future event or the fulfillment of a specified condition. Retirement or resignation contingent upon the appointment of a successor, for example, falls into this second group. In certain circumstances, it is historical practice that the President may nominate, and the Senate may consent to, individuals to fill an anticipated vacancy.[54]

Vacancies effective on a future date certain can be anticipated from at least three events. First, a statutory term of office may expire as of a particular date. As early as the Tenure of Office Act of

[51] Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d (2000). For a critique of the 1998 revision, see Joshua L. Stayn, Note, Vacant Reform: Why the Federal Vacancies Reform Act of 1998 Is Unconstitutional, 50 Duke L.J. 1511 (2001).

[52] Once again, the Board of Governors of the Federal Reserve provides just one of many examples. The relevant statute states that "[u]pon the expiration of their terms of office, members of the Board shall continue to serve until their successors are appointed and have qualified." 12 U.S.C. § 242 (2000).

[53] See Memorandum of July 11, 1968, supra note 47, at 157.

[54] Memorandum of Apr. 12, 1979, *reprinted in* 3 Op. Off. Legal Counsel 152, 158 (1979) (arguing that "the President's power to nominate and the Senate's power to confirm are not dependent on the existence of an *actual* vacancy" (emphasis added)); see also Memorandum of July 11, 1968, supra note 47, at 158 ("[F]rom the earliest years the Senate has exercised the power to confirm nominations to offices in which a vacancy in the near future is anticipated to take effect . . . .").

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1820, Congress has limited the terms of certain federal officials in order to require the President to make a new appointment.[55] The modern administrative state has widely adopted this practice of limiting an executive official's term of office as a means of providing Congress with an avenue for accountability and control.

Similarly, a vacancy effective on a future date certain can result from an actual vacancy that happens during the recess of the Senate when the President makes a recess appointment to the vacant office. Unlike an "acting" official, the recess appointee is a full officer of the United States in the constitutional sense, but with a temporary commission that expires on a date certain—the close of the next session of the Senate.[56] The President is empowered to nominate an individual for formal appointment to that office—often, but not always, nominating the recess appointee—even while the functions and duties of that office are carried out under the temporary commission.

Finally, officials often submit their resignation or retirement to be effective on a future date certain. Whether those anticipated vacancies are sufficiently definite and irrevocable depends on the officer; in particular, it depends on the extent of the President's power to remove the officer if she later rescinds her resignation or retirement. If the officer can be removed at the pleasure of the President, the prospective retirement or resignation only makes more definite the anticipated vacancy that results from the President's ability to remove such an officer through the appointment of a successor.[57] Trickier questions concern those officers protected from at-will removal by statute or the Constitution. An officer who serves a statutory term of office at an independent agency or commission, removable by the President only for cause, arguably makes an irrevocable resignation when setting a future date certain for vacating her office. First, rescinding an announced departure might itself be sufficient "cause" for removal. Second, these "inde-

[55] Tenure of Office Act of 1820, ch. 102, 3 Stat. 582; see also Harris, supra note 8, at 51–52 (noting that the bill was "advocated on the ground that it would provide a regular accounting by officers entrusted with the custody of government funds").

[56] U.S. Const. art II, § 2, cl. 3. While the precise date a session will close might not always be certain, the "future date certain" is no later than the day before the opening of the next Senate session and is therefore not a contingency that can be perpetually withheld.

[57] Cf. Memorandum of Apr. 12, 1979, supra note 54, at 152.

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pendent" officers are nonetheless executive branch officials and their letter of resignation to the head of that branch has legal force and effect when accepted by the President. Neither of these considerations apply, however, to life-tenured Article III judges. Life tenure grants federal judges the power to withdraw an anticipated retirement,[58] presenting a unique challenge to the vacancy prerequisite that will be discussed in Part III.

Anticipated vacancies that are effective on a future date certain, where the vacancy is definite and cannot be withdrawn or negated, meet the vacancy prerequisite and trigger the President's power to nominate. Only a stricter version of the vacancy prerequisite than is argued here—one effectively limiting the President's power to nominate to the occurrence of actual vacancies—would call into question nominations to fill such vacancies. Logic and historical practice make such a view implausible.

Anticipated vacancies that are contingent upon the occurrence of a future event are often less definite than those made effective on a future date certain. There are also circumstances in which those contingent vacancies are not definite enough to satisfy the vacancy prerequisite.

The forms of contingent vacancies with the longest historical pedigree are those conditioned upon the removal or elevation of an incumbent officeholder. Where the President has the power to remove the incumbent officeholder, contingent vacancies also satisfy the vacancy prerequisite of their own force. Where the President has the power to remove an executive branch official, he has long been permitted to do so through the act of appointing a successor.[59] In an early example, President John Adams nominated Ambrose Gordon to be Marshal of the District of Georgia in place

[58] See Clark v. United States, 72 F. Supp. 594, 597 (Ct. Cl. 1947); see also infra text accompanying notes 99–102.

[59] See McElrath v. United States, 102 U.S. 426, 437 (1880) (holding that the appointment of a Lieutenant Haycock to the position held by Lieutenant McElrath "operated . . . to remove the latter from the service, as if he had been dismissed by direct order of the President under his own signature" where it was conceded that the President "had the power to dismiss [Haycock], summarily, from the service"); see also Mullan v. United States, 140 U.S. 240, 245 (1891); Blake v. United States, 103 U.S. 227, 237 (1880); Morganston, supra note 11, at 52, 55–56 (noting Senator Daniel Webster's 1835 assertion of this "uniform practice").

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of the incumbent in that office, who was "to be superseded."[60] In such a case, it is functionally the same if the removable official resigns contingent upon the confirmation and appointment of a successor. Where the President has the power to remove an officer and then nominate a successor, historical practice has permitted the President to make the nomination first and to remove the incumbent by the act of appointment.[61] Nomination upon a contingent vacancy becomes more troublesome, however, where the President is without the power of removal.

In the case of elevation of an incumbent officeholder, the vacancy prerequisite is satisfied by the vacancy to which the incumbent is being elevated, and nominations following thereon are properly triggered by this vacancy. On December 21, 1796, for example, President Washington nominated Jonathan Jackson to be the Supervisor for the District of Massachusetts to replace the late Nathaniel Gorham. In the same communication to the Senate, Washington nominated John Brooks to replace Jonathan Jackson as Inspector of Survey No. 2 in the District of Massachusetts and Samuel Bradford to replace John Brooks as Marshal for the District of Massachusetts.[62] The nomination of Jonathan Jackson was due to the actual vacancy occasioned by the death of Nathaniel Gorham. The subsequent nominations of Brooks and Bradford were to anticipated vacancies contingent on the elevation of an incumbent officeholder. These nominations can be said to satisfy the vacancy prerequisite because they emanate from an actual vacancy which was definite and irrevocable.

In sum, the vacancy prerequisite is satisfied in the vast majority of circumstances where a President seeks to use his power to nominate. Actual vacancies most obviously trigger the commencement of the appointments process—including those actual vacancies where acting officials, holdover officers, or recess ap-

[60] Memorandum of July 11, 1968, supra note 47, at 169 (citing 1 Journal of the Executive Proceedings of the Senate of the United States, 1789–1805, at 329).

[61] While this Note does not challenge this settled understanding, it is not entirely clear that this long-standing practice would otherwise adequately satisfy the vacancy prerequisite in every case. It permits the President to effectively communicate to the Senate that the incumbent officeholder will be removed *only* upon the confirmation and appointment of a particular nominee.

[62] Memorandum of July 11, 1968, supra note 47, at 167–68 (citing 1 Journal of the Executive Proceedings of the Senate, 1789–1805, at 216).

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pointees continue to serve in the office. The President is also permitted to nominate successors to anticipated vacancies where the conditions of definiteness and irrevocability are satisfied, including most vacancies that are anticipated on a future date certain or that are contingent on the occurrence of a future event.

III. ANTICIPATED JUDICIAL VACANCIES

A. Judicial Retirement and the Departure Power

Short of death or conviction on articles of impeachment, a federal judge is the master of his tenure and thus sets the time and terms of his departure. But while appointments *to* the Supreme Court and lower federal courts have received substantial scholarly attention, departures *from* the federal bench enjoy far less attention.[63] The increasingly common practice of life-tenured judges making prospective retirements—anticipated on a future date certain or contingent upon the confirmation, appointment, or qualification of a successor—presents unique problems for operation of the appointments process.

Judicial retirement, as practiced today, was unknown to the founding generation. For the Republic's first eighty years, the only path of voluntary departure from the Article III judiciary was resignation.[64] A Justice leaving the Court resigned his commission and thereafter received no remuneration from the federal government.[65] As early burdens on the Justices of the Supreme Court lifted, they more frequently eschewed resignation and remained in place until their deaths; between 1801 and 1868, only four Justices resigned while twenty died in office.[66]

[63] Artemus Ward, Deciding to Leave: The Politics of Retirement from the United States Supreme Court 2 (2003). The relatively few exceptions include David N. Atkinson, Leaving the Bench (1999), Ward, supra, and Charles Fairman, The Retirement of Federal Judges, 51 Harv. L. Rev. 397 (1938). For examples of the attention paid to departure decisions in the lower federal courts, see the sources cited by Professor Ward, supra, at 259 n.4.

[64] Ward, supra note 63, at 3–4 tbl.1.1. The only other, nonvoluntary paths of departure were, of course, death and conviction upon articles of impeachment.

[65] Id. at 48.

[66] Id. at 3–4 tbl.1.1.

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The Judiciary Act of 1869 included the first retirement provision for federal judges,[67] which Congress intended to spur greater turnover on the Court and to protect the institution from the declining abilities of its aging members.[68] Any commissioned federal judge who had served at least ten years and reached seventy years of age was permitted to "resign his office," after which "during the residue of his natural life, [he would] receive the same salary which was by law payable to him at the time of his resignation."[69] Through the New Deal, the 1869 retirement provision had mixed success in enticing Justices to relinquish their seats on the Supreme Court.[70]

Impetus for new judicial retirement incentives grew out of frustration with the longevity of the "Nine Old Men" who resisted the New Deal from 1932 to 1937.[71] In February 1937, President Roosevelt proposed his ill-fated "court-packing" plan that would have permitted the appointment of an additional Supreme Court Justice for each Justice who was eligible to retire under the 1869 provision but remained on the bench. While Roosevelt's proposal failed, it led to the passage of the Retirement Act of 1937.[72]

The Retirement Act of 1937 allowed Supreme Court Justices to retire to "senior status" upon attaining the 1869 Act's qualifications.[73] With senior status, retired Justices remained federal judges

[67] Judiciary Act of 1869, ch. 22, 16 Stat. 44.

[68] Ward, supra note 63, at 67, 69.

[69] Judiciary Act of 1869, 16 Stat. 44, 45.

[70] There were thirty-six departures from the Court between 1869 and 1936. See Ward, supra note 63, at 4–5 tbl.1.1. Of these, only eleven Justices retired under the provisions of the 1869 Act, and of these eleven, Justices Field, McKenna, and Holmes waited more than a decade after obtaining eligibility. Id. at 74 tbl.4.2. An additional three Justices—Ward Hunt, William Moody, and Malcolm Pitney—were ineligible for retirement benefits under the 1869 Act but had their retirement provided for though a special act of Congress. Id. at 127. Nineteen Justices died in office during this period. Id. at 4–5 tbl.1.1. Of these nineteen, twelve were eligible to retire when they died. Id. at 74 tbl.4.2. Finally, three Justices—David Davis, Charles Evans Hughes, and John Clarke—resigned without retirement benefits. Id. at 4–5 tbl.1.1. Under the 1869 provisions, voluntary retirement from the Supreme Court became "the exception rather than the rule." Id. at 127.

[71] Id. at 128.

[72] Retirement Act of 1937, ch. 21, 50 Stat. 24.

[73] Id. The option of retiring to senior status was first made available to lower federal court judges in 1919. Act of Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1156, 1157; see also Ward, supra note 63, at 136–37, 284 n.34.

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and could be asked to temporarily assume active duty by the Chief Justice.[74] Whereas the 1869 provision required judges to "resign" in order to enjoy retirement benefits—ceasing their service as federal judges for purposes of constitutional protection from salary diminution—the Retirement Act of 1937 permitted a Justice to "retire" while retaining all the trappings of Article III power and status.[75] Further modifications to judicial retirement statutes permitted the retirement of permanently disabled Justices and judges regardless of age[76] and allowed those with senior status to receive the salary of their office, including salary increases.[77] The Retirement Act of 1954 extended the retirement option to judges reaching the age of sixty-five with fifteen years of service,[78] and in 1984, Congress instituted the "rule of eighty," which permits judges between ages sixty-five and seventy to retire upon any combination of age plus years of service totaling eighty.[79] Provisions for judicial retirement pensions and senior status have had a substantial impact on the voluntary departure decisions of Article III judges.[80]

[74] Ward, supra note 63, at 136–37. For an account that retiring to senior status—without nomination, confirmation, and appointment to that "office"—is unconstitutional, see David R. Stras & Ryan W. Scott, Are Senior Judges Unconstitutional?, 92 Cornell L. Rev. 453 (2007).

[75] See Ward, supra note 63, at 150. Both Justices Van Devanter and Sutherland elected to retire within the year and both cited the 1937 Act as part of their motivation. See id. at 137.

[76] Act of Aug. 5, 1939, ch. 433, 53 Stat. 1204, 1205.

[77] Act of June 25, 1948, ch. 646, 62 Stat. 869, 903 (codified as amended at 28 U.S.C. § 371 (2000)).

[78] Retirement Act of 1954, ch. 6, § 4, 68 Stat. 8, 12–13. For a discussion of the constitutional proposals considered during the 1940s and 1950s, see Ward, supra note 63, at 158–60.

[79] Retirement on Salary; Retirement in Senior Status, Pub. L. No. 98-353, 98 Stat. 350 (1984) (codified as amended at 28 U.S.C. § 371(c)); see also Ward, supra note 63, at 195. The 1984 Act finally removed the term "resignation" from the Judicial Code such that only retiring judges are eligible for benefits, whereas resigning judges are no longer members of the Article III judiciary and are ineligible for benefits. Subsequently, in 1989, Congress further amended the retirement provisions by requiring senior judges to certify that they have completed at least a quarter the regular workload in order to receive salary increases. Ward, supra note 63, at 155 tbl.7.1. In 1996, Congress eased this new requirement somewhat by permitting senior judges to carry-back sufficient work to earlier years in order to receive certification. Id.

[80] See, e.g., Yoon, supra note 8, at 145, 177.

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Retirement now overwhelmingly predominates as the departure method of choice for Supreme Court Justices.[81] Chief Justice William H. Rehnquist was the first member of the Court to die in office in more than half a century; every other member of the Court since the passage of the 1954 Retirement Act has retired from service or resigned.[82]

Provisions for judicial retirement have made strategic exercise of a "departure power" increasingly enticing for members of the federal judiciary.[83] Professor Ward's historical analysis of Supreme Court departure concludes that "generous retirement benefits coupled with a decreasing workload have reduced the departure process to partisan maneuvering"[84] and created a system where "partisanship has only recently become the chief organizing factor for departing justices."[85] In fact, Chief Justice Rehnquist conceded that departure decisions "in more cases than not" are now based on which party controls the White House.[86]

The relatively new phenomenon of voluntary judicial retirement creates tension with historical practice, the separation of powers and judicial independence secured by a life-tenured judiciary, and the Appointments Clause. Close scrutiny is required to ensure that when judges elect to depart the bench, the process for appointing a successor is properly triggered so that the underlying constitutional values and structural checks are protected from dilution.

B. A Brief History of Anticipated Judicial Vacancies

Anticipated judicial vacancies were unknown to the founding generation. In the early days of the Republic, when Article III judges decided to depart the bench, they did so immediately by re-

[81] See Peverill Squire, Politics and Personal Factors in Retirement from the United States Supreme Court, 10 Pol. Behav. 180, 181 (1988).

[82] Ward, supra note 63, at 5–6 tbl.1.1.

[83] Id. at 114.

[84] Id. at 12.

[85] Id. at 9.

[86] Interview by Charlie Rose with William H. Rehnquist, Charlie Rose, PBS, (Jan. 13, 1999), *quoted in* Ward, supra note 63, at 7. But see Stephen B. Burbank, Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices, 154 U. Pa. L. Rev. 1511, 1517–20 (2006) (pointing to empirical studies that fail to support anecdotal evidence that Supreme Court retirements are increasingly motivated by partisan considerations).

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linquishing their commission. Judges have increasingly chosen to announce their departure from active judicial service in advance—sometimes selecting a future date certain on which to depart, sometimes making their departure contingent upon a step in the political process of appointing a successor, and occasionally allowing other political decisions to determine the timing of their departure.

In late November 1869, just a few months after the Judiciary Act of 1869 established incentives for judges to voluntarily retire, an ailing Justice Grier demonstrated his growing incompetence for judicial duties during conference discussion of *Hepburn v. Griswold*.[87] Shortly thereafter, the Chief Justice and other Justices prevailed upon Justice Grier to retire from the bench, and on December 15, 1869, Justice Grier submitted his retirement to take effect on February 1, 1870.[88] Upon this vacancy anticipated to occur on a future date certain, President Grant proceeded to nominate Edwin Stanton to the Court on December 20, 1869, and Stanton was confirmed and appointed that same day with a commission effective the following February 1.[89]

On July 9, 1902, ailing Justice Horace Gray resigned contingent upon the appointment of a successor—the first of a small handful of Justices, now including Justice Sandra Day O'Connor, to make such a contingent retirement.[90] To fill Justice Gray's seat, President Theodore Roosevelt settled on the Chief Justice of Massachusetts, Oliver Wendell Holmes. Somewhat surprisingly, given the contingent nature of Justice Gray's retirement, Roosevelt initiated the

[87] 75 U.S. (8 Wall.) 603 (1869). Despite Grier's confusion, obvious incapacity, and vote-switching during Conference, Chief Justice Chase noted Grier's agreement in the invalidation of the Legal Tender Act when he announced the decision on January 29, 1870, just two days before the effective date of Justice Grier's retirement. See Atkinson, supra note 63, at 48–50. Chase's oft-criticized move was countered less than one year later—with two new Justices on the Court—in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870).

[88] Memorandum of July 11, 1968, supra note 47, at 158.

[89] Stanton died four days later, on December 24, 1869, and never sat on the Court. Id. An interesting constitutional question might have arisen had President Grant, rather than Stanton, died on December 24. It is unlikely, though it is unclear, that Stanton's appointment and commission would have retained any legal force once a new President succeeded Grant. Other Justices have retired effective on a future date certain. See id. at 159 (describing the retirement circumstances of Justices Shiras, Clarke, and Chief Justice Hughes).

[90] See Ward, supra note 63, at 100.

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process of issuing Justice Holmes a recess appointment to the Court.[91] The recess appointment was never completed, however, as Roosevelt and Justice Holmes determined that it would be best for the latter to remain in Boston pending his formal nomination, confirmation, and appointment. Justice Gray died that September—in what was regarded as the death of an active Justice—and Justice Holmes was nominated, confirmed, and finally appointed three months thereafter.[92]

Shortly after the June 1968 assassination of Robert Kennedy boosted the probability of a Nixon presidency, Chief Justice Earl Warren sent his retirement letter to President Lyndon Johnson, informing Johnson that he would retire "effective at [the President's] leisure."[93] President Johnson accepted Chief Justice Warren's retirement, but specified that it was to be effective upon the appointment of a successor.[94] The form of Chief Justice Warren's retirement touched off criticism—including from some Senators who claimed it would be improper to consider the subsequent nomination of Justice Abe Fortas for the center chair because Chief Justice Warren's letter had not, in fact, created a vacancy in that office.[95] Senator Ervin suggested that "if the President can appoint a successor to a [Chief] Justice who has not retired, then he can appoint successors to all Justices who have not retired and he can do

[91] See The Oxford Companion Guide to the Supreme Court of the United States 1132 app. B (2d ed. 2005) (listing Oliver Wendell Holmes as receiving a recess appointment from President Roosevelt on August 11, 1902). But cf. Henry B. Hogue, The Law: Recess Appointments to Article III Courts, 34 Presidential Stud. Q. 656, 662–65 (2004) (indicating that while President Roosevelt may have begun the recess appointments process, there is no evidence that he ever signed a commission or formally transmitted it to Holmes).

[92] Memorandum of July 11, 1968, supra note 47, at 155–56, 159. For more on the Holmes appointment and recess appointments in the wake of contingent retirements, see infra Subsection III.C.4.

[93] Abraham, supra note 5, at 290.

[94] See John Massaro, LBJ and the Fortas Nominiation for Chief Justice, 97 Pol. Sci. Q. 603, 605–06 (1982).

[95] See Robert Shogan, A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court 161–62 (1972); Ward, supra note 63, at 172–73; 114 Cong. Rec. 28,587, 28,592–93 (1968); Memorandum of July 11, 1968, supra note 47, at 154 ("Questions have been raised as to the power of the President to make and of the Senate to confirm [the nominations of Justice Fortas to succeed Chief Justice Warren and of Judge Thornberry to succeed Justice Fortas]. The primary objection is based upon the assertion that there is at present no vacancy in the office of Chief Justice . . . .").

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that without a time limit."[96] Most recently, Justice Sandra Day O'Connor reopened that debate by retiring contingent upon the confirmation of her successor.[97]

C. Constitutional Concerns with Anticipated Judicial Vacancies

Anticipated retirements from the Supreme Court highlight the troubling constitutional status of presidential nomination upon an anticipated judicial vacancy. Four considerations lead to the conclusion that anticipated judicial vacancies are insufficient to trigger the Appointments Clause process. First, a federal judge's life tenure permits him to withdraw a retirement or resignation announcement made effective on a future date certain or contingent upon a future event. This permits an "incumbent's veto" over the nomination of a successor. Second, the uncertainty of the anticipated vacancy skews the proper function of nomination followed by advice and consent. Third, vacancies effective upon the satisfaction of a political contingency—like the confirmation of a successor—permit political actors to choose the precise time and date of a federal judge's departure from the bench. This abdication of an Article III judge's control over his life tenure to actors in the political branches is in tension with the independence of the judicial branch. Finally, the contingent form of retirement raises questions related to the operation of the Recess Appointments Clause. An ailing judge unable to fulfill his duties could deny the President the ability to make a temporary appointment merely by choosing a contingent, rather than immediate, retirement.

Executive branch lawyers have argued that "[i]t is not unusual for a Justice or judge to advise the President of his intention to retire and to leave it to the President to propose a timing [for the retirement to become effective]."[98] Leaving the timing of an Article III judge's departure to Article II's Chief Executive is in tension with the scheme of separated powers. If judges can make their retirement contingent upon the confirmation, appointment, or qualification of a successor, there seems to be little keeping a judge

[96] 114 Cong. Rec. at 28,593.

[97] Letter from Justice Sandra Day O'Connor to President George W. Bush, supra note 1.

[98] Memorandum of July 11, 1968, supra note 47, at 155.

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from employing more radical contingencies—like the adoption of a particular constitutional amendment, the creation of additional judgeships, or even the appointment of a particular successor—and for nominations, confirmations, and appointments to proceed in the wake of such dubious contingent retirements.

1. Retirement Withdrawal and the "Incumbent Veto"

The prospective retirement of federal judges should not be deemed sufficient to satisfy the vacancy prerequisite because they are revocable by the incumbent judge until the date certain arrives or the contingency is satisfied. The judge or Justice's retirement letter serves as little more than puffery and is, therefore, not sufficiently definite and irrevocable to create a vacancy sufficient to trigger the elaborate appointments process.

In *Clark v. United States*, the Court of Claims considered an action brought by a Third Circuit Court of Appeals judge who appeared to have resigned his seat on the federal bench in order to join the military during World War II.[99] The court noted that a life-tenured judge's departure or continuance in office is "subject wholly and alone to the untrammeled will of the judge" and that

> [t]he only constitutional reason . . . for submitting to the President an unequivocal resignation of a judge is for the purpose of notifying the President that there exists a vacancy in the office so that the President may exercise his constitutional power of appointing a person to the vacancy.[100]

According to the court in *Clark*, unless a judge leaves to the President the decision to accept or reject a resignation, "[t]he President of the United States has nothing whatever to do with it."[101] While reserving the question, the court assumed for the purpose of deciding the case that a judge has the power to withdraw any resignation before its acceptance by the President or the appointment of a successor.[102]

[99] 72 F. Supp. 594, 595 (Ct. Cl. 1947).
[100] Id. at 597.
[101] Id.
[102] Id.

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If the dictum in *Clark* fairly states the law, then a judge who intends to retire on a future date, or who makes her retirement contingent on a future event, has made only an equivocal statement of her intent to retire. Until the vacancy is created by her actual departure from the bench, she may withdraw her retirement. Of course, there are few examples of attempts to withdraw a retirement or resignation from the federal bench and, other than the discussion in *Clark*, judicial examination of the question is exceedingly rare. But it is not entirely without historical basis. Justice Field issued a written statement that he would retire on December 1, 1897, after surpassing Chief Justice Marshall's record for longest tenure on the Court. Field's retirement letter was immediately presented to President McKinley, who had agreed to replace Justice Field with then-Attorney General Joseph McKenna. In the ensuing months, however, Justice Field wavered in his commitment to retire, and his nephew, Justice Brewer, wrote that efforts should be undertaken to "prevent any attempt [by Justice Field] to withdraw his resignation."[103] Justice Field eventually acquiesced in his retirement without seeking to withdraw it, but nobody seemed to question his prerogative to do so before it became effective.

The ability to withdraw a retirement while a presidential nomination of a successor is pending creates a potential for an incumbent's veto over the nominee. For example, if her resignation were revocable, Justice O'Connor could have withdrawn her resignation—and short-circuited the entire appointments process—if she disapproved of the nominations of either Harriet Miers or Samuel Alito. Similarly, Chief Justice Warren could have, as some Senators initially feared, withdrawn his retirement on the eve of President Nixon's inauguration after President Johnson's nomination of Justice Fortas faltered.[104] A judge's control over whether his anticipated vacancy shall become effective cautions against considering it sufficiently definite and irrevocable to trigger the President's power to nominate.

[103] Ward, supra note 63, at 98.
[104] 114 Cong. Rec. 28,593 (1968) (statement of Sen. McClellan).

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2. Skewed Advice and Consent Role

Nomination and confirmation of a new federal judge upon an anticipated vacancy—and particularly a contingent vacancy—creates unintended consequences for the balance of appointing power between the President and the Senate. A judge's retirement upon the confirmation, appointment, or qualification of his successor distorts the operation of the Appointments Clause envisioned by the founding generation. It skews the intended weight of both the nomination and the advice and consent functions and presents a compelling reason why the vacancy prerequisite is unsatisfied by contingent judicial retirement.

In *The Federalist*, Alexander Hamilton described the intended division of appointing responsibilities between the President and the Senate. The President was given primary responsibility and power over appointments because "one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices than a body of men of equal or perhaps even of superior discernment."[105] To skeptics who preferred the Senate have no role in the appointing process, Hamilton replied that "every advantage" of exclusively presidential appointment "would, in substance, be derived from the power of *nomination*" while the Senate's role would help avoid "several disadvantages which might attend the absolute power of appointment" being placed in the President's hands.[106]

Thus, in Hamilton's view, the Senate served merely to check tyrannical excess such that, in the normal case, there would be "no difference between nominating and appointing."[107] While the Senate had the power to overrule a nomination by withholding its consent, Hamilton viewed that outcome as "not very probable."[108] Why was Hamilton so confident that the Senate would not more frequently frustrate the President's choice of appointee? The safeguard against Senate rebuff of the President's choice was provided by the certainty that the refusal to confirm one presidential nomi-

[105] The Federalist No. 76 (Alexander Hamilton), supra note 17, at 455.

[106] Id. at 456.

[107] Id. at 457; see also The Federalist No. 77 (Alexander Hamilton), supra note 17, at 460 ("The right of nomination would produce all the good [of appointment], without the ill.").

[108] The Federalist No. 76 (Alexander Hamilton), supra note 17, at 457.

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nee would only assure yet another nominee of the President's own choosing. "The Senate could not be tempted by the preference they might feel to another to reject the one proposed," in Hamilton's words, "because they could not assure themselves[] that the person they might wish would be brought forward by a second or by any subsequent nomination."[109]

Presidential nomination and Senate consideration upon a contingent vacancy skews this premise in at least two significant ways. First, the absence of an actual vacancy reduces the cost to the Senate of withholding its consent to a disfavored presidential nominee in hopes of securing a better candidate for its subsequent confirmation. As the sitting Justice or judge continues to serve in his full capacity during the appointments process, the Senate faces less political pressure for quick action than they would face if the Court were left understaffed. In this sense, it was less politically costly for Senators to maneuver in opposition to President Bush's nomination of White House Counsel Harriet Miers to succeed Justice O'Connor, as the Court's October Term had opened with O'Connor seated on a full bench.[110]

More importantly, a judge's contingent retirement permits the Senate to reject a nominee *precisely* due to "the preference they might feel to another." They may prefer that the still-sitting judge remain on the Court—even if for a few extra weeks or months. In considering a nominee to a contingent judicial vacancy, the Senate does not face the stark choice between the nominee before them and a continued vacancy and future nominee; it instead faces the odd choice either to confirm the nominee or to keep the current judge in service a while longer. Senators could see much to gain from exercising this preference—even if only to ensure the sitting judge hears certain upcoming cases.[111] For example, the Democrat-

[109] Id.

[110] Conversely, it is more politically costly for Senators to obfuscate and delay advice and consent proceedings when the Court is understaffed. Had Justice O'Connor retired effective immediately, Senators would arguably have felt greater political pressure to acquiesce to the President's nominee so as to restore the Court to its full strength.

[111] See Massaro, supra note 94, at 605 (noting that President Johnson's nomination of Justice Fortas to succeed Chief Justice Warren, upon the latter's contingent retirement, "appeared to offer the Senate a choice—a dubious one to some senators—to confirm Justice Fortas or have Chief Justice Warren postpone retirement and con-

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controlled Senate was at least cognizant that Justice Thurgood Marshall's contingent retirement allowed him to continue service while the nomination of then-D.C. Circuit Judge Clarence Thomas languished before the Judiciary Committee. Perhaps recognizing this political reality, Justice Marshall submitted a new retirement letter to President George H.W. Bush that changed his contingent retirement into a retirement "effective as of this date" and short-circuited any benefits that Democrats may have expected to accrue from delay.[112]

A counterfactual example may elucidate this concern. Upon Justice O'Connor's contingent retirement, a cloture-proof cadre of at least forty-one Senators might have made clear their willingness to hold out for a nominee they characterized as "moderate" or "mainstream." They could have done so knowing that Justice O'Connor intended to continue her service indefinitely until the confirmation of a nominee. In response, the President may have narrowed his short list of candidates to those acceptable to Senators who would have preferred to retain Justice O'Connor rather than confirm a nominee they characterized as "too conservative."[113] This is certainly not Hamilton's vision of a system where the power to nominate is practically as potent as the power to directly appoint.

Finally, the skewed roles of nomination and confirmation upon a contingent vacancy could affect a judge's decision to choose a contingent, rather than immediate, retirement. Professor Hagle offers the empirical observation that "justices will consider the probability that a nominee holding policy goals similar to their own will be confirmed by the Senate."[114] But while Hagle and others focus on

tinue as chief justice").

[112] Ward, supra note 63, at 206, 303 n.172.

[113] This would, of course, have required the tacit cooperation of Justice O'Connor. If Justice O'Connor had been unhappy with the Senate's push for a certain kind of nominee, she could have replaced her contingent retirement with an immediate one, just as Justice Marshall did when Justice Thomas's nomination stalled before the Senate Judiciary Committee. See supra note 112 and accompanying text.

[114] Timothy M. Hagle, Strategic Retirements: A Political Model of Turnover on the United States Supreme Court, 15 Pol. Behav. 25, 32, 38 (1993). But see Burbank, supra note 86, at 1517–19 & nn.26–28 (noting literature suggesting "a number of difficulties" with the partisan turnover hypothesis).

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the *timing* of retirements,[115] Justices could make similarly strategic decisions as to the *form* of their retirement. A politically motivated Justice who shares the President's policy goals might make his retirement immediate and unconditional so as to maximize the political pressure to confirm the President's nominee. Conversely, a judge who opposes the President's policy goals, and prefers those held by a majority of Senators, might choose to retire contingent upon the confirmation of a successor, in hopes of minimizing pressure on the Senate for a quick confirmation.[116]

3. Delegated Removal Power to the Political Branches

The Constitution provides federal judges an important structural protection of their independence: life tenure.[117] Under Article III, these judges serve during "good Behaviour" and are not subject to the political machinations of removal or salary diminution.[118] Unless impeached by the House of Representatives and convicted of "High Crimes and Misdemeanors" by the Senate, a federal judge is the master over his tenure on the bench, and the decision to depart, short of death, is entirely his own.[119] But when a judge re-

[115] See, e.g., Hagle, supra note 114, at 31; see also id. at 27–29 (summarizing previous research on the factors leading to the timing of vacancies). Professor Hagle found that Supreme Court Justices are significantly responsive to the outcome of Senate elections. A President can expect 0.51 more retirements following an election in which the majority of the Court identifies with the party in control of the Senate and that party loses seats. Id. at 38.

[116] Compare this hypothesis with the one Professor Hagle advances for the strategic use of timing, where he argues that

> justices who share the president's general ideological orientation will be more likely to time their resignation to maximize the attainment of their shared policy goals. Conversely, justices who oppose the president's policy goals will be more likely to defer retirement, or time it to minimize the attainment of the president's policy goals (thus maximizing their own policy goals).

Id. at 30.

[117] See United States ex rel. Toth v. Quarles, 350 U.S. 11, 16 (1955) ("[C]ourts are presided over by judges appointed for life, subject only to removal by impeachment. Their compensation cannot be diminished during their continuance in office. The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government.").

[118] U.S. Const. art. III, § 1.

[119] For an intriguing argument that, under the original understanding of the Good Behaviour Clause, impeachment and conviction were not "the only possible means of

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tires contingent upon the appointment of a successor, he delegates the date and time of his departure to the political branches in a manner inconsistent with Article III.

In the executive branch, the appointment of a successor to an occupied office has long been viewed as the simultaneous removal of the sitting officer under the President's executive power. By analogy, then, the retirement of an Article III judge contingent upon the confirmation, appointment, or qualification of a successor is tantamount to that judge's abdication of power over his own tenure in office and delegation of a limited removal power to the political branches. A life-tenured judge delegates to the Congress and President the power to remove her from office at a date and time of their choosing—the time they choose to satisfy the contingency—which is in significant tension with norms of judicial independence protected by judicial life tenure.

An objection to this formulation is that there can be no danger to judicial independence or the separation of powers where, in the case of judicial retirement, the judge must be the first party to act. As Justice O'Connor voluntarily departed the Court, for example, what is the harm in her deciding to delay departure until the President could secure a suitable replacement?

For three reasons, constitutional concerns are not assuaged simply because the sitting Justice is the one that chooses a contingent retirement. First, the precise timing of a judicial departure can have important ramifications in pending cases, and delegation of that timing to the operations of the political branches is troublesome. Senators may be willing to delay or hasten a confirmation, appointment, or qualification in order to affect votes on imminent judicial decisions. After Senate Democrats delayed Judge Alito's confirmation by one week—to shorten the time between final confirmation and the State of the Union speech, according to pundits[120]—the Court used the additional time to issue its 5-4 decision

removing federal judges with good-behavior tenure," see Saikrishna Prakash & Steven D. Smith, How To Remove a Federal Judge, 116 Yale L.J. 72 (2006).

[120] See Amy Goldstein, Senate Panel's Vote on Alito Delayed Until Next Week, Wash. Post, Jan. 17, 2006, at A3.

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in *Central Virginia Community College v. Katz*,[121] in which Justice O'Connor provided a decisive vote in the majority.[122]

Second, ceding to the President and Senate the ability to time the satisfaction of a retirement contingency for a time they deem to be politically expedient unnecessarily politicizes that aspect of a judge's departure. It took just over six months to satisfy the contingency in Justice O'Connor's retirement letter, but it is possible that the political branches could hold such a retirement in abeyance for considerably longer. President Nixon appointed Chief Justice Burger nearly a year after Chief Justice Warren submitted his retirement letter to President Johnson; Senate opposition to Johnson's nomination of Justice Fortas caused months of delay and allowed Senators to carry over the appointment from the presidency of one party to that of the other.[123]

Third, the Appointments Clause forbids a constitutional actor from abdicating the precise duties and responsibilities required of him by the Appointments Clause.[124] As Justice Souter articulated, concurring in *Weiss v. United States*, maintenance of the structural benefits provided by the Appointments Clause requires careful guard against the "diffusion" of the powers it confers.[125] To the extent a judge's delegation of removal authority through contingent retirement causes a diffusion of appointing responsibilities, then the antiabdication principle applies.[126]

4. Creation of "Holdover Judges"

The Recess Appointments Clause empowers the President to fill vacancies that happen during the recess of the Senate with tempo-

[121] 546 U.S. 356 (2006).

[122] Before Senate Democrats invoked their procedural privilege to delay the Judiciary Committee's vote by one week, Senate Majority Leader Bill Frist had intended a confirmation vote by Friday, January 20, 2006. See Goldstein, supra note 120. The Court issued its decision in *Katz* on Monday, January 23, 2006. 546 U.S. at 356.

[123] See Ward, supra note 63, at 172–73.

[124] See Weiss v. United States, 510 U.S. 163, 189 (1994) (Souter, J., concurring).

[125] Id. at 188 n.3 (quoting Freytag v. Comm'r, 501 U.S. 868, 884 (1991)).

[126] See id. at 189 ("The Appointments Clause forbids both aggrandizement and abdication."); id. at 189 n.5 ("Barring Appointments Clause abdication strikes me as plainly less problematic [than nondelegation doctrine] . . . because the text of the Constitution describes with precision the nature of the branches' appointments powers.").

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rary officeholders whose commission will then expire at the end of the Senate's next session.[127] When an Article III judge retires contingent upon the confirmation, appointment, or qualification of a successor, however, it remains an open question when, if ever, a vacancy "happens" for the purposes of triggering the President's authority to make a recess appointment during recesses of the Senate.

The use of recess appointments to permit temporary commissions to individuals to join the federal judiciary—which in some cases requires that a recess appointee decide cases while his nomination is pending before the Senate—is a subject of intense political and scholarly debate.[128] Recess appointments to the Article III judiciary are, nonetheless, a long historical practice.[129] Presidents have used the recess appointment power to fill vacancies on the federal bench—including at least twelve recess appointments to the Supreme Court.[130]

When a judge retires contingent upon the confirmation, appointment, or qualification of his successor, current practice is to say a vacancy happens for the purpose of triggering the main Appointments Clause, but not for triggering the Recess Appointments Clause. While President Theodore Roosevelt seems to have believed that Justice Gray's contingent retirement provided him the authority to grant Justice Oliver Wendell Holmes a recess appointment,[131] current practice seems to dictate that Justice

[127] U.S. Const. art. II, § 2, cl. 3.

[128] Critics of recess appointments to the Article III judiciary argue that such appointments are unconstitutional or unwise given the provision that federal judges serve with life tenure and the underlying norms of judicial independence that life tenure protects. For a sampling of the debate, see United States v. Woodley, 751 F.2d 1008, 1009 (9th Cir. 1985) (en banc); United States v. Allocco, 305 F.2d 704, 706 (2d Cir. 1962); Edward A. Hartnett, Recess Appointments of Article III Judges: Three Constitutional Questions, 26 Cardozo L. Rev. 377, 429 (2005); Michael Herz, Abandoning Recess Appointments?: A Comment on Hartnett (and Others), 26 Cardozo L. Rev. 443 (2005).

[129] The earliest recess appointment to the Article III judiciary took place in August 1791, when President Washington granted a temporary commission appointing Thomas Johnson an Associate Justice of the Supreme Court upon Justice Rutledge's resignation in order to serve as Chief Justice of South Carolina. The Documentary History of the Supreme Court of the United States, 1789–1800, supra note 35, at 74–75.

[130] See Rutkus & Bearden, supra note 2, at 19 tbl.1.

[131] One possible explanation for Roosevelt's understanding was that Justice Gray's letter of retirement was written in the alternative—effective immediately or contin-

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O'Connor's contingent retirement letter did not grant President Bush the authority to make a recess appointment to her seat. Any attempt to do so during a recess of the Senate (granting a temporary appointment to White House Counsel Harriet Miers, for example) would likely have been rebuffed.

The ability to craft retirement in such a way as to foreclose the possibility of temporary appointment to the bench could be a dangerous authority. Recess appointments—whatever their original intent—permit the full-functioning of the federal government, including the judiciary, after a previous officeholder ceases to carry out his duties and before a successor is formally installed. When a judge grows unable to perform his duties, the traditional departure method is immediate retirement, which permits a recess appointment if the vacancy happens during a Senate recess. The contingent retirement mechanism, however, permits a judge to retire while precluding the temporary assignment of his duties through recess appointment. A judge could cease to participate actively in the disposition of a court's business, but remain nominally active until the formal appointment of a successor—possibly leaving a particular court understaffed in the interim.

The judge issuing a contingent retirement thus employs the legal fiction whereby the vacancy in his seat is said to occur only at the very moment that contingency—conformation, appointment, or qualification—occurs. The strain of that fiction is magnified when the judge is unable to discharge his duties while the political channels process a nomination, conformation, and appointment to his not-yet-vacant seat.[132] By analogy, when Congress creates certain term-limited offices by statute, it often provides that the incumbent will continue to serve past the expiration of his term until a succes-

gent upon the qualification of a successor at the President's choice. See John A. Garraty, Holmes's Appointment to the U.S. Supreme Court, 22 New Eng. Q. 291, 291 (1949). Roosevelt made the retirement contingent by accepting it in that form and perhaps believed the offer of immediate resignation remained open and could be effectuated upon a recess appointment. If this is true, however, then President Lyndon Johnson could have granted Justice Fortas a recess appointment to Chief Justice Warren's seat in 1968, removing Chief Justice Warren by making a recess appointment at his pleasure.

[132] 28 U.S.C. § 372(b) permits the appointment of an additional judge where a sitting judge is unable to discharge his duties due to a permanent physical or mental disability, but the provision only applies to inferior court judges and not to Supreme Court Justices.

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sor qualifies. Courts have held, however, that absent express or implied Congressional intent to the contrary, the President can remove such a "holdover" officer and, when the Senate is in recess, make a recess appointment to that office.[133] In *Swan v. Clinton*, for example, the D.C. Circuit held that the removal of a holdover officer and recess appointment of a successor was valid and in keeping with the "equal validity" of the recess appointments process and regular appointments process in the constitutional scheme.[134]

An Article III judge is protected from removal, however, by the provisions of the Constitution. If that judge makes his departure from the bench contingent upon the confirmation, appointment, or qualification of a successor, then he in effect declares himself an irremovable holdover judge until such time as the contingency is fulfilled. This seems to impinge on the President's constitutional power to make recess appointments to vacancies that happen during the recess of the Senate by employing the fiction that a vacancy never occurs until the very moment the contingency is satisfied through the appointment of a successor.

CONCLUSION

The drafters of the Constitution carefully considered where to place—and how to apportion—the power to appoint federal officers. They also took judicial independence quite seriously and sought to protect it with life tenure and protection from salary diminution. When the framing generation pondered these issues and articulated their solutions, judges left the bench unequivocally through either death or resignation. Over time, however, Congress saw fit to entice federal judges to retire voluntarily at a time of their—sometimes politically calculated—choosing.

This Note argues that the practice of presidential nomination and Senate confirmation of individuals to serve as federal judges upon an anticipated vacancy is inconsistent with the constitutional design of the appointing process. This practice can skew the bal-

[133] See Swan v. Clinton, 100 F.3d 973, 988 (D.C. Cir. 1996).

[134] Id. at 987 (quoting United States v. Woodley, 751 F.2d 1008, 1009–10 (9th Cir. 1985) (en banc) (citations omitted)); see also Memorandum of Feb. 6, 1978, *reprinted in* 2 Op. Off. Legal Counsel 398, 399–400 (1978) ("[H]oldover provisions do not fill a vacancy but merely provide for a temporary method of ensuring the performance of the functions of the office after the expiration of the term of the incumbent . . . .").

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ance between the President and the Senate in exercising their respective Appointments Clause roles, put the precise timing of judicial departure in political hands, keep Presidents from ensuring fully staffed courts through recess appointments, and risk a predecessor's "veto" of his successor through withdrawal of the anticipated retirement. It raises the concern that federal judges can make politically calculated decisions regarding not only the timing of their retirements but also the form.

It is fair to ask, in conclusion, whether this argument has practical import. What change could its acceptance bring to the operation of the appointments process? As perhaps is obvious to the reader, this Note does not argue that a court should, or even could, find Justice Alito's appointment to the Supreme Court *void ab initio* due to a nomination and confirmation provided upon Justice O'Connor's contingent retirement. Instead, this Note argues that contingent judicial retirement presents problems for the operation of the Appointments Clause that were unforeseen by the founding generation. The practice presents complications for the intended operation of the appointing process and can be inconsistent with the precise balance of responsibilities enshrined in its three-step waltz between the President and the Senate.

It is for the political branches—future Presidents and Senators—to decide whether this growing practice should be abandoned in favor of returning to a system of judicial nomination, confirmation, and appointment only upon clear, definite, and unequivocal departure. A President could see institutional interests as served by restoring Hamilton's vision of more potent presidential nominations and announce that he will not nominate upon anticipated judicial retirements.[135] Alternatively, Senate leaders could see its interests as served by making clear that they will not provide consent to any nomination made to fill an anticipated retirement.[136] In either case,

[135] Facing an antagonistic Senate majority and the imminent departure of Justices who ideologically identify more closely with the Senate than with the President, the latter might see value in taking the contingent retirement option off the table so as to maximize political pressure to confirm his eventual nominee by disallowing the Senate to reject his choice in favor of keeping their departing champion on the bench a while longer.

[136] Facing a Court closely divided along ideological lines, such that one departure would tip the balance in important cases, Senate leaders expecting the imminent departure of Justices who ideologically identify more closely with the President than

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political actors engaged in the appointing process are the most likely to embrace the arguments advanced in this Note and cause them to become governing constitutional principles.

with the Senate, might see value in enticing the President to nominate an acceptable candidate by forcing his hand through a rebalanced Court caused by an actual vacancy.

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