

ESSAY

THE CONSTITUTIONALITY AND ADVISABILITY OF RECESS APPOINTMENTS OF ARTICLE III JUDGES

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I became interested in the topic of recess appointments of Article III judges when President Clinton made a recess appointment of a fine lawyer to the Fourth Circuit.¹ At the time, a good deal of controversy arose in the popular press as to whether judicial recess appointments are constitutionally permissible or, even if constitutional, whether they are wise.² It is those two questions I address in this essay.

I

As for the constitutionality of such appointments, we all know that life tenure and a guaranteed salary have been deemed essential to an independent federal judiciary since the founding of our country. Thus, Article III of the Constitution specifically provides:

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¹ President William J. Clinton made a recess appointment of Judge Roger Gregory to the United States Court of Appeals for the Fourth Circuit on December 27, 2000. See Louis Fisher, Cong. Research Serv., RL 31112, *Recess Appointments of Federal Judges 22* (2001). The Senate did not act, but President George W. Bush renominated Judge Gregory to the Fourth Circuit on May 9, 2001, prior to the expiration of the recess appointment, and the Senate promptly confirmed him. See Denis Steven Rutkus et al., Cong. Research Serv., RL 31868, *U.S. Circuit and District Court Nominations by President George W. Bush During the 107th–109th Congresses 6 n.14* (2007); Neil A. Lewis, *Bush to Nominate 11 to Judgeships Today*, N.Y. Times, May 9, 2001, at A24. In July 2001, the Senate confirmed the appointment by a vote of 93 to 1, with Senator Trent Lott casting the sole dissenting vote. See Deborah Sontag, *The Power of the Fourth*, N.Y. Times Mag., Mar. 9, 2003, at 22.

² See, e.g., Editorial, *Avoiding the Senate*, Wash. Post, Dec. 31, 2000, at B6; Dan Eggen, *Clinton Names Black Judge to Appeals Court*, Wash. Post, Dec. 28, 2000, at A1; Neil A. Lewis, *Clinton Names A Black Judge; Skirts Congress*, N.Y. Times, Dec. 28, 2000, at A1; Neil A. Lewis, *Senator Vows He Will Fight Clinton's Judicial Selection*, N.Y. Times, Dec. 29, 2000, at A16.

“The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during continuance in office.”³

Yet the Recess Appointments Clause of Article II of the Constitution grants the President the power to fill “all vacancies” that emerge in federal offices during a Senate recess by conferring temporary commissions that expire at the end of the next Senate session.⁴ Arguably, then, there is a direct conflict between the two provisions. The Recess Appointments Clause seems to contemplate the appointment of temporary judges who necessarily lack what the Founders believed to be an essential attribute of an independent judge—life tenure—as mandated by Article III.

A

The text of the two constitutional provisions offers no ready resolution to this conflict. Article II’s Recess Appointments Clause appears on its face to be unqualified. It extends to “all vacancies” in offices ordinarily filled pursuant to the general Appointments Clause, including “Judges of the Supreme Court.”⁵ It expressly provides an expiration date for a recess appointment—the end of the Senate’s next session.⁶ And the Recess Appointments Clause nowhere indicates that judicial appointments are to be treated any differently than other offices. Rather, judges are specifically subject to Article II’s impeachment provision.⁷

While the text of Article II does not appear to support any limit on the scope of the Recess Appointments Clause, such a limitation might be inferred from the text of Article III because at least Article III’s specific language reflects the Framers’ insistence that judicial independence requires life tenure. This specificity suggests that the more general language of the Recess Appointments Clause represents an attempt to address a minor problem of administrative continuity without considering the impact on judicial inde-

³ U.S. Const. art. III, § 1.

⁴ U.S. Const. art. II, § 2, cl. 3.

⁵ U.S. Const. art. II, § 2.

⁶ U.S. Const. art. II, § 2, cl. 3.

⁷ U.S. Const. art. II, § 4.

pendence. If we apply traditional principles of statutory construction—that the specific governs the general⁸—the general language of the Recess Appointments Clause would, under this reading, yield to the specific language of Article III.

But this argument is circular: the basic contradiction in the text of the two constitutional provisions begs the question of which provision is the general one and which is the exception. For example, it could also be fairly argued that the Recess Appointments Clause, which deals with the specific problem of recess appointments, is more specific than Article III, which generally governs the term and compensation of judges. The text simply does not yield an obvious answer.

B

Writings surrounding the Constitutional Convention, such as the debates at the Convention, correspondence among the delegates, and contemporaneous writings, including the Federalist Papers—the legislative history, if you will—do provide some assistance.

Although we have little direct evidence as to how the Framers intended the Recess Appointments Clause to operate,⁹ Convention records do clearly indicate that, when the Framers considered questions surrounding the general appointment power, their most pressing concern was how to select the federal judiciary.¹⁰ The Convention split on where to vest the general appointment power, primarily because of the importance of the power to appoint judges. One group of delegates favored vesting the power to appoint judges in the Senate alone, warning that an executive with

⁸ See *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2457 (2010) (Sotomayor, J., dissenting).

⁹ The placement of the Recess Appointments Clause immediately after the general Appointments Clause seems to suggest that its main purpose was to promote government continuity and effectiveness by ensuring that important federal offices would not remain vacant simply because the Senate was unable to act. In Federalist No. 67, Hamilton supports this view of the Clause's purpose by explaining that vacancies might "be necessary for the public service to fill without delay" when it would be "improper to oblige [the Senate] to be continually in session." The Federalist No. 67, at 329 (Alexander Hamilton) (Terence Ball ed., 2003).

¹⁰ See Richard H. Fallon, Jr. et al., *Hart & Wechsler's Federal Courts and Federal System* 9 (6th ed. 2009); 1 Max Farrand, *The Records of the Federal Convention of 1787* 232–33 (1911).

exclusive appointment power would be perceived by the people as a monarch.¹¹ Another group favored vesting the appointment power in a strong executive because it feared local partiality would accompany any process of legislative appointments.¹² After debating the matter throughout the summer, in late 1787 the delegates agreed to vest the general appointments power in the President with approval by the Senate.¹³ The very same day, they also adopted the Recess Appointments Clause without any discussion.¹⁴ Given their previous extensive debates as to the appointment of judges, it seems unlikely that they would have intended to exclude judges from the Recess Appointments Clause without discussing and explicitly indicating that intention.¹⁵

Consistent with this view, Federalist No. 67 states that the Recess Appointments Clause extends to vacancies in all of the offices subject to the general Appointments Clause.¹⁶ Moreover, evidence suggests that the Recess Appointments Clause was based on similar provisions in state constitutions, which were understood at the time to extend to vacancies in the state judiciary.¹⁷ Thus, contemporaneous writings arguably support extending the Recess Appointment Clause to judicial vacancies.

We must balance this evidence against the undeniable fact that the Framers emphasized the importance of judicial independence, however.¹⁸ The English and colonial experiences had convinced

¹¹ See 1 Farrand, *supra* note 10, at 119.

¹² See *id.* at 120.

¹³ See 2 Farrand, *supra* note 10, at 538–40.

¹⁴ See *id.* at 540.

¹⁵ See Thomas A. Curtis, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 *Colum. L. Rev.* 1758, 1769–73 (1984).

¹⁶ The Federalist No. 67, at 328–29 (Alexander Hamilton) (Terence Ball ed., 2003).

¹⁷ For example, in 1776 Pennsylvania ratified a state constitution that authorized the President to “supply every vacancy in any office . . . until the office can be filled in the time and manner” otherwise directed. Pa. Const. of 1776, § 20; Sources and Documents Illustrating the American Revolution and the Formation of the Constitution 170 (Samuel Eliot Morison ed., 1923). That same year, the Virginia constitution vested the power to appoint judges in the legislature but, in the “case of death, incapacity, or resignation,” allowed for the governor to appoint judges simply with the advice (though not the consent) of the supra-legislative Privy Council. Va. Const. of 1776, § 20.

¹⁸ See Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 *Yale L.J.* 72, 87–88 (2006).

them that life tenure for judges was necessary for judicial independence. Both the Randolph and Patterson Plans, which together form the basis of the Constitution, contained provisions guaranteeing judicial tenure during “good behavior,” which the Founders understood to mean life tenure subject only to impeachment.¹⁹ Thus, when a few delegates proposed that Congress be permitted to remove judges with presidential consent, a strong opposition defeated the measure.²⁰ Post-Convention, many Federalist Papers stressed the importance of tenure and salary protection in maintaining judicial independence.²¹ And when the states were considering ratification of the Constitution, such protection of judicial officers was roundly praised even by anti-Federalists.²²

Thus, taken together, the revolutionary era and post-ratification writings are inconclusive as to whether the Recess Appointments Clause was intended as a limited exception to Article III’s tenure and salary provisions. What we have is a Recess Appointments Clause—which generally applies to “all vacancies” without any explicit exception—standing in tension with Article III’s protections of the federal judiciary.²³

¹⁹ See Fallon, *supra* note 10, at 9 n.54.

²⁰ See 2 Farrand, *supra* note 10, at 44–45, 429–30.

²¹ See The Federalist No. 78 (Alexander Hamilton).

²² See Letter XV: Letters from the Federal Farmer to the Republican, The Anti-Federalist Papers (Jan. 18, 1788), available at <http://www.constitution.org/afp/fedfar15.htm> (showing the Anti-Federalists were explicitly “against [judges’] depending upon annual or periodical grants”).

²³ The aspiration of maintaining an independent judiciary has invigorated the Supreme Court since Chief Justice Marshall’s tenure. In *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828)—a case argued by Daniel Webster before a Supreme Court composed exclusively of members from the Founding Era—Chief Justice Marshall distinguished Article III’s “constitutional Courts” from the territorial courts then established in Florida. Chief Justice Marshall reasoned that Florida’s territorial courts—created by Congress for territories that had not yet matured to statehood—did not act as “constitutional Courts” precisely because their judges did not hold offices for life. *Id.* at 523, 546. As such, the Florida territorial courts in which judges held office for four years at a time did not possess “the judicial power conferred by the Constitution”; such “judicial power” could not be “deposited” in a court in which judges had fixed terms. *Id.* at 546. Thus, the holding rests on the premise that a court with judges who do not have life tenure is not sitting as an Article III court.

C

When, as here, the text and history of the Constitution are unclear regarding the scope of a constitutional provision, the Supreme Court has turned to historical practice as an interpretive aid.²⁴ Historical practice in this instance is extensive.²⁵

Throughout American history, all three branches of government have proceeded on the view that recess appointments of Article III judges are indeed constitutional. Beginning with President George Washington, for the next 150 years almost every President filled judicial vacancies by recess appointment without suggestion from any quarter that the practice violated the Constitution. In fact, from 1794 through 2000, almost every President, save six, made at least one recess appointment to an Article III court.²⁶ Fifteen of these recess appointments were to the Supreme Court.²⁷ By 2000, Presidents had made more than 300 recess appointments of Article III judges, and of those, only thirty-four had not been confirmed.²⁸

The first recess appointment of an Article III judge was made in November 1789, only seven months after the inauguration of George Washington, and the nominee was a Virginian. During a

²⁴ See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 790–91 (1983) (relying on early historical practice to uphold legislative prayer); *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 678 (1970) (“It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches . . . is not something to be lightly cast aside.”); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (“Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions . . .”).

²⁵ Records of recess appointments dating back to the early days of the nation are scarce. This essay, like much of the commentary surrounding recess appointments, relies largely on a brief filed by the United States in a constitutional challenge to recess appointments, discussed within, which was heard by the U.S. Court of Appeals for the Ninth Circuit. See Second Supplemental Brief for the United States at A1–A25, *United States v. Woodley*, 726 F.2d 1328 (9th Cir. 1983) (No. 82-1028) [hereinafter *Compendium of Recess Appointments*].

²⁶ See *id.*; see also Stuart Buck et al., *Judicial Recess Appointments: A Survey of the Arguments* 17–26 (2004), available at http://www.fed-soc.org/publications/pubID.87/pub_detail.asp.

²⁷ See *Compendium of Recess Appointments*, *supra* note 25, at A15.

²⁸ See *id.* at A16.

recess, Washington appointed Cyrus Griffin to the District of Virginia; the Senate later confirmed Griffin.²⁹

Washington made nine recess appointments in all, including two to the Supreme Court.³⁰ In 1791, he appointed Justice Thomas Johnson, whom the Senate later confirmed.³¹ But Washington's second recess appointment, made in 1795 to John Rutledge, did not fare so well.³² The Senate later rejected Rutledge—not because of any problem with his performance of judicial duties (although some have suggested he was deranged),³³ but apparently because of a vitriolic speech he had made against the Jay Treaty.³⁴

Some Presidents were seemingly determined to appoint a person a judge, even if they had to use the recess appointment power repeatedly. Eight men in total have received two or more recess appointments.³⁵ Undoubtedly each involves a fascinating story, but surely one of the most fascinating must be Henry Livingston's. In May 1805, President Thomas Jefferson appointed Livingston to the District Court in New Jersey; the appointment expired without Senate confirmation in April 1806.³⁶ Less than seven months later, Jefferson again bestowed a recess appointment on Livingston—this time to the Supreme Court. The Senate promptly confirmed that appointment.³⁷

²⁹ See *id.* at A26.

³⁰ See Buck, *supra* note 26, at 25–26.

³¹ See Compendium of Recess Appointments, *supra* note 25, at A13.

³² See Fisher, *supra* note 1, at 14–15.

³³ See, e.g., Bret Schulte, A Supreme History of Conflict, U.S. News and World Report (Sept. 4, 2005), <http://www.usnews.com/usnews/news/articles/050912/12history.htm> (noting that Attorney General Edmund Randolph described Rutledge as “deranged in his mind”).

³⁴ See *id.*

³⁵ Compendium of Recess Appointments, *supra* note 25, at A1–25. The individuals nominated more than once by recess appointment were Henry B. Livingston to the District of New York and the Supreme Court (Jefferson), Hamilton G. Ewert to the Western District of North Carolina (McKinley), William C. Van Fleet to the Northern District of California (T. Roosevelt), John E. Sater to the Southern District of Ohio (T. Roosevelt), Oscar R. Hundley to the Northern District of Alabama (twice by T. Roosevelt, once by Taft), Milton D. Purdy to the District of Minnesota (T. Roosevelt, Taft), William J. Tilson to the Middle District of Georgia (Coolidge), and Roy W. Harper to the Eastern District of Missouri and the Western District of Missouri (Truman). *Id.*

³⁶ See *id.* at A25.

³⁷ See *id.*

The recess appointments of Rutledge and Livingston indicate that a failed recess appointment may have more to do with the political winds than an appointee's merits. For example, Roy Winfield Harper, who sat on the Eastern District of Missouri for nearly a half century, received no fewer than three recess appointments from President Harry Truman.³⁸ His first two nominations died in the Republican-controlled Senate; the Senate confirmed his third in 1949 soon after Democrats took control of the Senate.³⁹ President Herbert Hoover appointed George E. Q. Johnson, who successfully prosecuted Al Capone for tax evasion, to the federal district court in Illinois during a recess.⁴⁰ His eventual confirmation was considered a lock.⁴¹ Unforeseen delays in the confirmation proceeding derailed his nomination, however, and after winning the Presidency in late 1932, Democrat Franklin D. Roosevelt indicated that he did not support Judge Johnson's nomination.⁴² Shortly thereafter, Judge Johnson left his seat after serving only seven months on the federal bench.⁴³

Indeed, even one powerful Senator in opposition to a recess appointee has sunk a confirmation. Such was the case of Wallace McCamant—President Calvin Coolidge's recess appointee to the U.S. Court of Appeals for the Ninth Circuit in 1925.⁴⁴ McCamant had unexpectedly supported President Calvin Coolidge's nomination as the Republican vice presidential candidate at the 1920 national convention and, also rather unexpectedly, opposed the nomination of Hiram Johnson for President. Johnson, a sitting Senator during McCamant's confirmation hearing, walked the judge into an ill-advised statement that Theodore Roosevelt "was

³⁸ See *id.* at A11; Biographical Directory of Federal Judges, Federal Judicial Center, <http://www.fjc.gov/servlet/nGetInfo?jid=2689&cid=999&ctype=na&instate=na> (last visited May 29, 2011).

³⁹ See Compendium of Recess Appointments, *supra* note 25, at A11; see also Party Division in the Senate: 1789–Present, United States Senate, http://www.senate.gov/pagelayout/history/one_item_and_tasers/partydiv.htm (last visited May 29, 2011).

⁴⁰ See Compendium of Recess Appointments, *supra* note 25, at A13.

⁴¹ Richard Cahan, *A Court that Shaped America: Chicago's Federal District Court from Abe Lincoln to Abbie Hoffman* 96 (2002).

⁴² See *id.*

⁴³ See Compendium of Recess Appointments, *supra* note 25, at A13.

⁴⁴ See *id.* at A16.

not a good American” because of his support for the recall of judicial decisions.⁴⁵ Unsurprisingly, McCamant’s nomination failed.⁴⁶

President Dwight Eisenhower’s only failed recess appointment—Ike went 26 for 27—was John Feikens to the Eastern District of Michigan.⁴⁷ Feikens, a prominent Michigan Republican, had criticized the powerful Michigan Senator Patrick V. McNamara, a Democrat, for using union dues for political purposes. Although McNamara won the battle—scuttling Feikens’s confirmation in 1961—Feikens won the war. President Richard Nixon nominated Feikens to a new judgeship in 1970, and likely because Senator McNamara had died by then, the Senate confirmed him.⁴⁸

Though the personal and political stories underlying each recess appointment vary widely, there is no question that recess appointments to the federal bench have persisted throughout our nation’s history and have successfully gained confirmation except in very rare circumstances.

D

From all of this—the language of the Constitution, its legislative history, and most especially the well-established historical practice—can we, with some assurance, conclude that recess appointments of Article III judges are constitutional? The Supreme Court has never considered the question, but the U.S. Courts of Appeals for the Second and Ninth Circuits have. Both have concluded that recess appointments of Article III judges pass constitutional muster.

The first of these cases involved John Cashin, whom President Eisenhower appointed to the Southern District of New York during a Senate recess in August 1955.⁴⁹ When the Senate reconvened, it confirmed Judge Cashin.⁵⁰ Nevertheless, Dominic Allocco, who had been tried by Judge Cashin prior to the Senate confirmation,

⁴⁵ Political Notes: Unexpected, *Time*, Feb. 8, 1926, available at <http://www.time.com/time/magazine/article/0,9171,728946,00.html>.

⁴⁶ See Compendium of Recess Appointments, *supra* note 25, at A16.

⁴⁷ See *id.* at A9.

⁴⁸ See John Minnis, Profile in Brief—John Feikens, Miracle Worker, *LegalNews.com* (Feb. 25, 2010), <http://www.legalnews.com/oakland/652887>.

⁴⁹ See Fisher, *supra* note 1, at 18.

⁵⁰ See *id.*

contended that his conviction and sentence must be set aside because Judge Cashin had not been constitutionally empowered to preside over the trial. Allocco did not argue that Judge Cashin lacked the ability or the character to be a judge but simply maintained that the President had no power to appoint “temporary judges.”⁵¹

With no great difficulty, the Second Circuit concluded that Judge Cashin was constitutionally empowered to preside over the trial. The court reasoned:

Although Article III incorporates certain protections for permanent federal judges considered vital to their independence, including life tenure, it cannot be said that judicial offices must remain vacant despite the existence of the recess power, because judges who might be appointed thereunder do not have life tenure. The evils of legislative and executive coercion which petitioner foresees have no support in our nation’s history. This hypothetical risk must be weighed against the danger of setting up a roadblock in the orderly functioning of the government which would result if the President’s recess power were limited by petitioner’s interpretation.⁵²

The second recess appointment giving rise to litigation is that of Walter Heen. In late 1980, President Jimmy Carter appointed Heen to the District Court in Hawaii during a recess; Judge Heen promptly assumed his duties as a district judge.⁵³ When it reconvened, the Senate refused to confirm Judge Heen’s nomination and, immediately after his inauguration in January 1981, President Ronald Reagan withdrew the nomination. Judge Heen, however, continued to serve as a federal district judge, pursuant to his recess appointment, until December 1981 when the Senate adjourned and his recess appointment expired.⁵⁴

On reviewing the appeal of a suppression ruling made by Judge Heen, a panel of the Ninth Circuit, believing it to be jurisdictional, raised the issue *sua sponte* of whether Judge Heen could constitutionally preside over a criminal trial. A unanimous panel held that

⁵¹ See *United States v. Allocco*, 305 F.2d 704, 709 (2d Cir. 1962).

⁵² *Id.*

⁵³ See Fisher, *supra* note 1, at 19.

⁵⁴ See Curtis, *supra* note 15, at 1760 n.10.

because a recess appointee lacked “the essential attributes of an Article III judge, which are necessary for an independent judiciary,” he could not “exercise the judicial power of the United States.”⁵⁵

The Ninth Circuit took the case en banc and concluded that the President could constitutionally confer a judicial commission during the recess of the Senate.⁵⁶ The court relied on the language of the Constitution, the legislative history, and most especially on the long historical practice. The court concluded that history demonstrated that, even in the context of Article III judges, “there is an unbroken acceptance of the President’s use of the recess [appointment] power . . . by the three branches of government.”⁵⁷

There has been no further litigation as to whether Article III’s requirements, including life tenure, render the recess appointment of federal judges unconstitutional.⁵⁸ But the academics generally

⁵⁵ *United States v. Woodley*, 726 F.2d 1328, 1339 (9th Cir. 1984), rev’d en banc, 751 F.2d 1008 (9th Cir. 1985).

⁵⁶ See *United States v. Woodley*, 751 F.2d 1008, 1011 (9th Cir. 1985) (en banc).

⁵⁷ *Id.*

⁵⁸ The only further litigation involving the constitutionality of recess appointments of federal judges challenged not the practice but its timing—whether such an appointment can be made in an intrasession recess. See *Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 2004). The Eleventh Circuit ruled that intrasession recess appointments were constitutional and that judicial vacancies need not arise during a recess in order to be filled by recess appointment. *Id.* at 1226 (“We accept that the phrase in the Recess Appointments Clause that speaks of filling ‘[v]acancies that may happen during the [r]ecess,’ . . . in context, means that, if vacancies ‘happen’ to exist during a recess, they may be filled on a temporary basis by the President. This view is consistent with the understanding of most judges that have considered the question, written executive interpretations from as early as 1823, and legislative acquiescence.”). In recent years, scholars have focused primarily on the questions considered in *Evans v. Stephens*—namely, whether recess appointments can be made during intrasession recesses and if the vacancies must arise during recesses in order for recess appointments to be made. See, e.g., Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 *Cardozo L. Rev.* 377, 382–89, 408–15 (2004); 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); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 *UCLA L. Rev.* 1487, 1487 (2005). Scholars generally agree with the holdings of *Evans v. Stephens*. See, e.g., Hartnett, *supra*, at 441–42. Interestingly, although the Supreme Court has not directly addressed the constitutionality of recess appointments of Article III judges, Justice Stevens concurred in the denial of certiorari after the Eleventh Circuit’s en banc opinion in 2005, noting that the case raised “significant constitutional questions regarding the President’s” recess appointment

agree with the Second and Ninth Circuits that such appointments are indeed constitutional.⁵⁹

II

The constitutionality of recess appointments of Article III judges does not, however, render them wise. The question of the wisdom of judicial recess appointments is a fairly modern one. For our country's first 150 years, we had little discussion of whether such appointments were a good idea.⁶⁰

This is hardly surprising given that the Recess Appointments Clause was designed to deal with problems arising when our country was young and when transportation and communication were difficult. The Judiciary Act of 1789, which Congress passed in its very first session, created a judiciary dramatically different from today's.⁶¹ The system put into place by the Framers consisted of only nineteen federal judges: six Supreme Court justices and thirteen district judges, with no court of appeals judges. Any vacancy was potentially disastrous for the functioning of the judiciary.⁶² In

power. *Evans v. Stephens*, 544 U.S. 942 (2005) (Stevens, J., respecting the denial of certiorari). Justice Stevens reminded lower courts that:

it would be a mistake to assume that our disposition of this petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as vacancies on this Court, with appointments made absent consent of the Senate during short intrasession "recesses."

Id. at 943. Justice Stevens declined to grant certiorari in part because recess appointments have declined dramatically in the past half century. *Id.*

⁵⁹ See, e.g., Curtis, *supra* note 15, at 1769 (arguing for the constitutionality of recess appointments of Article III judges); Hartnett, *supra* note 58, at 441–42 (same); Patrick Hein, In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights, 96 Calif. L. Rev. 235 (2008).

⁶⁰ Extant records indicate that the wisdom of recess appointments to the federal judiciary during this period was seriously questioned only once. In 1937, believing that President Franklin D. Roosevelt was awaiting a recess to fill a Supreme Court vacancy, Senator Vandenburg introduced a resolution that Supreme Court appointments could only be made while the Senate was in session. See William Ty Mayton, Recess Appointments and an Independent Judiciary, 20 Const. Comment. 515, 546 (2004). No recess appointment to the Supreme Court was attempted by President Franklin D. Roosevelt.

⁶¹ Judiciary Act of 1789, 1 Stat. 73, § 11 (1789).

⁶² See Blake Denton, While the Senate Sleeps: Do Contemporary Events Warrant A New Interpretation of the Recess Appointments Clause?, 58 Cath. U. L. Rev. 751, 759, 760 n.73 (2009) (citing an 1823 Attorney General opinion for the proposition that

those days, the Senate would come to Washington and sit in session for several months and then recess for six to nine months.⁶³ If executive—or judicial—appointments were not made during the time when the Senate was not in session the government might well falter, and so the social context substantially justified the use of recess appointments.

In twentieth century, post-war America, our transportation and communication systems advanced at a dizzying rate, making it far more difficult to find any practical rationale for recess appointments.⁶⁴ At the same time, colleges and law schools graduated persons in record numbers.⁶⁵ During the booming economy, these graduates (and their teachers) took advantage of the opportunity not available during the depression or in war time to consider esoteric questions like the advisability of recess appointments of federal judges. These factors coalesced into a perfect storm when President Eisenhower made *three* recess appointments to the Supreme Court.

First, in 1953, he appointed Earl Warren as Chief Justice during a Senate recess.⁶⁶ In response, Professor Henry M. Hart wrote a famous letter to the Harvard Crimson setting forth severe criticism of the practice. Professor Hart reasoned:

Governor Warren cannot possibly have [the] independence [required of a federal judge] if his every vote, indeed, his every question from the bench, is subject to the possibility of inquiry in later committee hearings and floor debates to determine his fitness to continue in judicial office. To say this is in no way to question his integrity as an individual. No judge should be put in such a position. So far as personal attitudes are relevant, the point is not what Governor Warren and his friends will think about his dis-interestedness, but what defeated litigants will

“in some cases, ‘the vacancy may paralyze a whole line of action in some essential branch of our internal police’”).

⁶³ See Pyser, *supra* note 58, at 64.

⁶⁴ See Denton, *supra* note 62, at 762.

⁶⁵ See David Segal, *Is Law School a Losing Game?*, N.Y. Times, Jan. 8, 2011, at BU1; Annie Lowrey, *A Case of Supply v. Demand*, Slate (Oct. 27, 2010, 4:14 PM), http://www.slate.com/articles/business/moneybox/2010/10/a_case_of_supply_v_demand.html.

⁶⁶ See Note, *Recess Appointments to the Supreme Court—Constitutional But Unwise?*, 10 Stan. L. Rev. 124, 125–26 (1957).

think, and others who may be disappointed by the court's decision on the explosive issues which are to come before it.⁶⁷

This statement was followed by a good deal of similar sentiment in the press and within Congress.⁶⁸

The timing of Chief Justice Warren's appointment may have added grist for the mill, for at that time, the Court was poised to rehear oral argument in *Brown v. Board of Education*. And when the Senate reconvened in January 1954, the Court had reheard the case but not yet issued its decision. This prompted one scholar in the late 1950s to note that "whatever the southern Senators may have thought Warren's views on desegregation would be," they were hindered in making "an issue of them at the confirmation hearings."⁶⁹ In any event, although Chief Justice Warren did not even attend his confirmation hearings, the Senate easily confirmed him on March 1, 1954. Six weeks later, the Court issued its unanimous *Brown* decision, written, of course, by Chief Justice Warren.⁷⁰

Soon thereafter President Eisenhower appointed Justice William Brennan to the Court during a Senate recess.⁷¹ Before Justice Brennan's confirmation hearing, he participated as a member of the Court in the oral argument of *Jencks v. United States*, involving the prosecution of a purported member of the Communist Party.⁷² At Justice Brennan's confirmation hearings, Senator Joseph McCarthy pressed him on whether he agreed that communism was "a conspiracy designed to overthrow the United States Government."⁷³ Justice Brennan demurred, replying that as a sitting Justice he could not discuss issues involved in cases currently pending before the Court.⁷⁴ Nevertheless, the Senate quickly confirmed Justice Brennan; Senator McCarthy was the only senator voting

⁶⁷ Henry M. Hart, Jr., Letter to the Editor, Hart Says Confirmation First, Harv. Crimson, Oct. 5, 1953, available at <http://www.thecrimson.com/article/1953/10/2/hart-says-confirmation-first-to-the/>.

⁶⁸ See, e.g., Arthur Krock, Judicial Appointments in Absence of Senate, N.Y. Times, May 7, 1959, at A32; see also Pyser, *supra* note 58, at 81–82.

⁶⁹ Note, *supra* note 66, at 140.

⁷⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁷¹ See Fisher, *supra* note 1, at 15.

⁷² *Jencks v. United States*, 353 U.S. 657 (1957).

⁷³ Hearings Before the S. Comm. on the Judiciary on Nomination of William Joseph Brennan, Jr., 85th Cong. 17–18 (1957).

⁷⁴ *Id.*

against confirmation.⁷⁵ A few weeks later, Justice Brennan issued his opinion for the Court in *Jencks*, which reversed the alleged communist's conviction because the Government refused to comply with an order to produce relevant evidence in its possession.⁷⁶

When President Eisenhower followed the recess appointments of Chief Justice Warren and Justice Brennan with still another recess appointment, it seemed the final straw.⁷⁷ The nominee, Potter Stewart, was at least a Republican (unlike Justice Brennan) and was rapidly confirmed by the Senate. But nonetheless the Senate passed a resolution,⁷⁸ accompanied by a report of the Senate Judiciary Committee,⁷⁹ expressing the sense of the Senate that recess appointments to the Supreme Court should not be made except under unusual circumstances. The House of Representatives also issued a report outlining its "concerns over the effect of recess appointments" to Article III courts.⁸⁰ The congressional reports listed several possible solutions to the problems arising from judicial recess appointments. For example, Congress suggested:

- providing that district judges appointed in recess would only hear preliminary matters;
- authorizing circuit judges to be temporarily appointed to the Supreme Court, obviating any need for recess appointments to that Court; and

⁷⁵ Seth Stern & Stephen Wermiel, *Justice Brennan: Liberal Champion* 119–20 (2010).

⁷⁶ 353 U.S. at 672.

⁷⁷ Ironically, President Eisenhower himself apparently grew to regret at least one of his recess appointments. Although praising Earl Warren's "integrity, honesty, [and] middle-of-the-road philosophy" at the time of his appointment, President Eisenhower was later quoted as remarking that Warren's appointment was "the biggest damn-fool mistake I ever made." Dwight D. Eisenhower, President's News Conference, The American Presidency Project (Sept. 30, 1953), <http://www.presidency.ucsb.edu/ws/index.php?pid=9709>; see also Bernard Schwartz & Stephan Leshner, *Inside the Warren Court* 92 (1983).

⁷⁸ S. Res. 334, 86th Cong., 106 Cong. Rec. 12761 (1960) (enacted) ("[I]t is the sense of the Senate that the making of recess appointments to the Supreme Court . . . should be avoided except under [the] most unusual and urgent circumstances.").

⁷⁹ S. Rep. No. 86-1893, at 1–2 (1960).

⁸⁰ Staff of H. Comm. on the Judiciary, 86th Cong., *Recess Appointments of Federal Judges* 25 (Comm. Print 1959).

- requiring the President to nominate within thirty days of occurrence of a vacancy, and the Senate to act within a reasonable time thereafter.⁸¹

Of course, none of these reforms was ever adopted. Yet it seems inconceivable that we will witness the recess appointment of another Supreme Court Justice at any time in the foreseeable future. The intense scrutiny that now surrounds Supreme Court appointments—and the modern emphasis on the Senate committee hearings (even if those hearings are, as then-Professor Kagan once called them, a “vapid and hollow charade”⁸²)—would seem to foreclose a recess appointment to that Court.⁸³

On the other hand, future recess appointments to lower courts seem less improbable. Indeed, presidents have long used the recess appointment power to ease the way for putting well-qualified and distinguished judges from underrepresented groups on the federal bench.⁸⁴ Four of the first five African American appellate judges were recess-appointed to their first Article III judgeships. On October 21, 1949, President Harry Truman appointed William Hastie to the U.S. Court of Appeals for the Third Circuit during a Senate recess.⁸⁵ On October 5, 1961, President John Kennedy named Thurgood Marshall as a recess appointee to the Second Circuit.⁸⁶ On January 6, 1964, President Johnson appointed Spottswood Robinson and A. Leon Higginbotham to the federal district court bench.⁸⁷ Both would eventually be nominated and confirmed to sit

⁸¹ Id. at 35. Tellingly, not even the congressional reformers suggested that recess judicial appointments violated the Constitution, though the recommendations went so far as to suggest a constitutional amendment preventing the recess appointment of federal judges. See Curtis, *supra* note 15, at 1785 n.154.

⁸² Elena Kagan, *Confirmation Messes, Old and New*, 62 U. Chi. L. Rev. 919, 941 (1995).

⁸³ See, e.g., Jack M. Balkin, *The Passionate Intensity of the Confirmation Process*, *Jurist* (Apr. 15, 2004), <http://jurist.law.pitt.edu/forum/Symposium-jc/Balkin.php> (describing how partisan warfare has come to infect the Supreme Court nomination process).

⁸⁴ See *Compendium of Recess Appointments*, *supra* note 25, at A1–A25.

⁸⁵ See *id.* at A11.

⁸⁶ See *id.* at A17.

⁸⁷ See *id.* at A12, A20.

on federal appellate courts.⁸⁸ On the same days that President Truman appointed Judge Hastie to the Third Circuit and President Kennedy appointed Justice Marshall to the Second Circuit, both Presidents made recess appointments of the first two women to sit on a federal district court. President Truman appointed Burnita Shelton Matthews to the District of Columbia District Court, and President Kennedy appointed Sarah Tilghman Hughes to the Northern District of Texas.⁸⁹ Moreover, Jacob Trieber, the nation's first Jewish federal judge, was a President William McKinley recess appointee to the Eastern District of Arkansas in July of 1900.⁹⁰ And Samuel Alschuler, one of the first Jewish federal appellate judges, was President Woodrow Wilson's recess appointee in 1915.⁹¹ Future recess appointments could similarly help to address the lack of minority representation on the federal bench.⁹²

⁸⁸ See *id.* Of these four African American recess appointees, Justice Marshall's confirmation took by far the longest—nearly a year—due to delays by Southern Democrats, the only senators to vote against Marshall's confirmation. See *id.* at A1–25; Juan Williams, *Thurgood Marshall: American Revolutionary* 298–303 (1998). One of Justice Marshall's first clerks, Ralph Winter, himself later an Article III judge, recounted that during Justice Marshall's recess appointment he had no permanent office space in the federal courthouse where the Second Circuit sits, as the chief judge made no permanent arrangements for him. Instead, Justice Marshall and his clerks worked out of temporary government offices and would inhabit other judges' chambers when they were on vacation. See Williams, *supra*, at 297–98. Ironically, that federal courthouse was renamed the Thurgood Marshall United States Courthouse in 2003. See Editorial, *Thurgood Marshall Courthouse*, *N.Y. Sun*, Apr. 15, 2003, at 6.

⁸⁹ See *Compendium of Recess Appointments*, *supra* note 25, at A12, A17. In that post, Judge Hughes, whom a state senator once remarked should be home washing dishes, presided over the three-judge panel and wrote the opinion that overturned Texas's abortion laws in 1970 in *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *aff'd* in part and *rev'd* in part, 410 U.S. 113 (1973). Barbara Bader Aldave, *Women in the Law in Texas: The Stories of Three Pioneers*, 25 *St. Mary's L.J.* 289, 293 (1993). Judge Hughes is perhaps best known, however, for swearing in President Johnson on Air Force One after the Kennedy assassination. Mary L. Clark, *One Man's Token is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 *Vill. L. Rev.* 487, 514 (2004).

⁹⁰ Jeffrey B. Morris, *The American Jewish Judge: An Appraisal on the Occasion of the Bicentennial*, 38 *Jewish Soc. Stud.* 195, 204 (1976).

⁹¹ *Id.* at 208.

⁹² See, e.g., *Women in the Federal Judiciary: Still a Long Way to Go*, National Women's Law Center (Mar. 8, 2011), http://www.nwlc.org/sites/default/files/pdfs/factsheetnumberofwomeninjudiciary_3.pdf (noting that only thirty percent of active judges on the thirteen federal courts of appeal and twenty-eight percent of active district court judges are female); Justice Sonia Sotomayor, *Address to the "Raising the Bar" Symposium*, U.C. Berkeley School of Law (Oct. 26, 2001),

Future recess appointments of lower court judges might also serve another laudable purpose: to hasten the appointment process for all Article III judges. As of March 2011, ninety-three judgeships to the lower federal courts sit vacant, and forty-two judicial nominees remain in limbo.⁹³ This problem will likely only worsen in the near future. Judges have been retiring at an accelerated rate,⁹⁴ and the political branches have thus far proved either unable or unwilling to keep pace in the confirmation of new judges.⁹⁵ The looming presidential election promises to slow the process even more.

Both the *Washington Post* and the president of the American Bar Association have described the situation as approaching “crisis” proportions,⁹⁶ while the Associated Press has lamented that the pace of new confirmations has slowed to a degree unmatched in the past forty years.⁹⁷ Although I am not so sure that the situation is so dire as to create a “crisis,” I certainly agree with Chief Justice Roberts’s recent observation that there exists an “urgent need for the political branches” to address the problem of vacancies.⁹⁸

An increasing number of voices—from within Congress and the media—has begun calling for recess appointments to remedy the

http://berkeley.edu/news/media/releases/2009/05/26_sotomayor.shtml (last visited Apr. 2011) (observing that Latinos represent only 10 of 147 active Circuit Court judges and 30 of 587 active district court judges).

⁹³ See United States Courts, *Judicial Vacancies*, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx> (last visited May 25, 2011).

⁹⁴ See Jerry Markon & Shailagh Murray, *Federal Judicial Vacancies Reaching Crisis Point*, *Wash. Post*, Feb. 8, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/07/AR2011020706032.html?sid=ST2011020800441>.

⁹⁵ See Article III Judicial Vacancies/Nominations/Confirmations, American Bar Ass’n (Dec. 9, 2010), http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/judicial_vacancies/2010dec9_judvac.authcheckdam.pdf (noting that the 111th Congress confirmed only forty-three judges).

⁹⁶ Markon & Murray, *supra* note 94; *Judicial Vacancies Slow the Wheels of Justice*, American Bar Ass’n (July 12, 2010), <http://www.abanow.org/2010/07/judicial-vacancies-slow-the-wheels-of-justice/>. The effects have proven particularly acute in the District of Arizona, which recently declared a judicial emergency that suspended normal time limits for bringing criminal defendants to a speedy trial. Amanda Bronstad, *Federal Courts in Arizona Declare Judicial Emergency*, *Nat’l L.J.* (Jan. 25, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202479228598&rss=nlj>.

⁹⁷ Associated Press, *Obama Getting Fewer Judges Confirmed Than Nixon*, Sept. 3, 2010, <http://www.cbsnews.com/stories/2010/09/06/politics/main6839525.shtml>.

⁹⁸ Hon. John G. Roberts, *Year-End Report on the Federal Judiciary 8* (2010), available at <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>.

problem of judicial vacancies.⁹⁹ The use of the recess appointment tool might help break the logjam over some pending nominees, both by providing nominees a platform from which to demonstrate their skill and impartiality and by providing the President with important leverage to help broker compromises over the pace of confirmation for his judicial nominations.¹⁰⁰ The Senate might not always fully agree with the use of judicial recess appointments, but if history is any guide, the President will nominate qualified “inferior court” judges, and usually the Senate will eventually confirm them.

Of course, some will probably argue, as Professor Hart did, that a recess appointee cannot have the “independence” necessary for any good judge because his votes, opinions, even his “question[s] from the bench,” are subject to questioning by the Senate Judiciary Committee, which holds his judicial fate in its hands.¹⁰¹ This is a legitimate concern, but the list of modern judicial recess appointments makes one pause before readily accepting it, for some of our most distinguished modern-day judges have been recess appointees by both Republican and Democratic Presidents. For example, in addition to President Eisenhower’s recess appointments of Chief Justice Warren and Justices Brennan and Stewart and President Clinton’s recess appointment of Judge Gregory, recess appointments have been bestowed on Augustus Hand, David Bazelon, and Griffin Bell, and in the Fourth Circuit to Morris Soper, John J. Parker, and Armistead Dobie.¹⁰² Whatever your politics, these are not political hacks. Rather, all seem to have had no trouble maintaining the appropriate “judicial independence.”

Even the sole recess appointment in recent history not to attain confirmation—Judge Heen from Hawaii—seems to be a man of independent judgment. A year after the Senate refused to confirm

⁹⁹ See, e.g., Press Release, American Bar Ass’n, Florida Sen. Nelson Tells ABA He Will Urge White House to Make Recess Appointments During Presidents’ Day Congressional Break (Feb. 8, 2010), available at http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=880; Doug Kendall, Confirmation Warriors, *Slate* (Oct. 8, 2010), <http://www.slate.com/id/2270327/pagnum/all/#p2>; Kevin Drum, The Future of the Supreme Court, *Mother Jones* (Aug. 6, 2010), <http://motherjones.com/kevin-drum/2010/08/future-supreme-court>.

¹⁰⁰ See Denton, *supra* note 62, at 775 (explaining that Senate Democrats, in 2004, “assured floor votes on twenty-five nominees in exchange for the president’s pledge not to make any further recess appointees”).

¹⁰¹ Hart, *supra* note 67.

¹⁰² See Compendium of Recess Appointments, *supra* note 25, at A3–A20.

Judge Heen as a United States district judge, he was appointed to Hawaii's Court of Appeals. After serving as an appellate judge for twelve years, in October 1994, Judge Walter Heen proclaimed that he planned to retire.¹⁰³ He explained that he made his decision while surfing off Waikiki. Realizing that he would have to cut the expedition short to go to work, he decided instead to retire from the bench.¹⁰⁴

III

In sum, it seems fair to make several conclusions about the recess appointment of Article III judges. Although the Founders empowered the President to make recess appointments when the need for such appointments was far clearer, the clause by its terms seems to apply to Article III judges. Moreover, historical practice certainly suggests that Article III itself does not render such appointments unconstitutional. As to the wisdom of recess appointments, they do seem to serve some laudable purposes. Of course, the difficulties inherent in such appointments—for the judge, the litigants, and the Senate—are real. But again, if historical practice serves as any prediction of the future, the judges receiving recess appointments seem to have surmounted these difficulties.

¹⁰³ See *Kunewa v. Joshua*, 924 P.2d 559, 560 (Haw. Ct. App. 1996) (noting Judge Heen's retirement in October 1994).

¹⁰⁴ See Walter Heen, Associated Press, Oct. 4, 1994; Richard Borreca, Democrats Send Up Akiba as Party Chair, Honolulu Star Bulletin, Apr. 17, 2001, available at <http://archives.starbulletin.com/2001/04/17/news/story5.html>.