Is There a Duty to Make Judicial Recess Appointments?

*by Todd Gaziano**

The constitutional separation of powers is lubricated by the comity each branch owes to the other two. Comity encompasses due respect for the prerogatives and obligations of other branches. When shared powers are at play, the bare minimum that is required is reciprocal action within a reasonable amount of time. The Constitution defines the time limit for a President's signature or veto of legislation presented to him from Congress and the consequences for his refusal to act within that time limit.[1] No precise time limit exists for other joint actions,[2] and that probably renders one branch's inaction nonjusticiable. It does not follow, however, that there can be no constitutional violation for inaction in all such circumstances.

One branch may violate the separation of powers by acting or purporting to act beyond the scope of its powers or by refusing, or failing, to act on a joint obligation initiated by another branch. The President would violate his constitutional duty if he refused, or failed, to act to enforce a judicial decree within a reasonable amount of time. As was true with the Line Item Veto law in 1996, Congress and the President sometimes create mandatory (and expedited) jurisdiction in the Supreme Court for questions that involve serious separation of powers disputes.[3] The Supreme Court would violate its duty if it refused, or failed, to act on a justiciable case brought under such provision within a reasonable amount of time. Likewise, the Senate violates its constitutional duty when it does not provide its advice and consent to presidential nominations (affirmative or negative) within a reasonable time period. Such a violation is even more troublesome when the Senate fails to act on nominations for lower court judges and other "inferior Officers" whose appointment could be vested in the President alone.[4] With the prolonged filibuster of several important court of appeals nominations, some of which have been pending for over thirty-two months, the Senate is violating its constitutional obligations to the Executive and Judicial branches.[5]

The focus of this essay, however, is whether the Senate's failure to act discharges the President's obligation to temporarily fill judicial vacancies that have existed for many years. The Constitution charges the President with the duty to fill vacancies that arise in the federal judiciary and other high offices. The Treaty/Appointments Clause states that the President "shall have Power" to negotiate treaties, a power he may exercise at his discretion.[6] The obligation to make appointments is not discretionary. The second part of the same clause directs that "he *shall* nominate, and by and with the Advice and Consent of the Senate, *shall* appoint [ambassadors and consuls], Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not . . . otherwise provided for" in the Constitution.[7]

Indeed, the Framers deemed it so important that some offices not remain vacant for extended periods of time that they provided a method for the President to make temporary appointments without Senate action. The Recess Appointments Clause vests the President with the "Power to fill up all Vacancies that may happen [to exist] during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[8] The parenthetical in the preceding quote is supplied for clarity because it is well settled that the President may exercise his recess appointment power to fill any vacancy that may happen *to exist* during a long Senate recess, rather than those that may happen *to occur* during such a recess. Whether the Senate itself may have preferred this construction at one point in its history (so that it would not have to extend its sessions to receive and act on nominations for vacancies that arise late in a session) or not,[9] this interpretation has not been the subject of serious dispute since the first Attorney General opinion on the subject was issued in 1823.[10]

A more interesting question is whether the President may exercise his recess appointment power to fill vacancies in Article III courts. Although the power to issue judicial commissions of short duration (typically ten to eighteen months) might seem incongruous with the normal life-tenure of a federal judge, it is also well settled that the President's recess appointment power extends to vacancies in Article III judgeships. The text of the Recess Appointments Clause states that the power to confer temporary commissions extends to "all" vacancies. Thus, the shorter tenure of judges receiving recess appointments has been read as an exception to the normal tenure of Article III judges—rather than a bar to their appointment or exercise of power. This interpretation has withstood judicial review and is also supported by the almost unbroken practice of every President, including George Washington and other Framers of the Constitution. An excellent, short discussion of the constitutional basis, historical practice and practical workings of the recess appointment of judges can be found on the Federalist Society website.[11]

In all, more than 300 federal judges have exercised judicial power as recess appointees.[12] Most of them were also nominated, confirmed and appointed for a regular lifetime term. President Washington made nine recess appointments, including two to the Supreme Court. Although the Senate refused to confirm Chief Justice John Rutledge for a lifetime seat on the Court, it raised no objection to his recess appointment or to the other eight recess appointees who were all confirmed for lifetime positions. The first five Presidents made a total of twenty-nine judicial recess appointments. Fifteen Supreme Court justices, including two Chief Justices, received recess appointments, and all but Rutledge were subsequently

confirmed for lifetime positions. The justices receiving recess appointments in the twentieth century were Chief Justice Earl Warren and Justices Potter Stewart, William Brennan, and Oliver Wendell Holmes. Prior to the Nixon Administration, every President had granted judicial recess appointments except for William Henry Harrison, who died one month after taking office, and his successor, John Tyler.[13]

That the President has the power to make judicial recess appointments does not answer the more pressing questions of whether he should do so and whether he may have a constitutional obligation to do so in particular cases. Questions of prudence and duty in statecraft are rarely cut and dried. Nevertheless, if a duty does exist, a President should not hesitate to fulfill it even if doing so seems politically controversial at the time. President Jefferson's pardon of those still imprisoned for violating the unconstitutional Alien and Sedition Acts presents an analogous example. Although the pardon power is entirely discretionary with respect to violations of legitimate criminal laws, the President's oath to preserve and defend the Constitution "to the best of [his] Ability"[14] may require him to use his power to free those unconstitutionally imprisoned by the federal government. That is true whether the pardons are popular or not.

The recess appointment power is also discretionary in most instances. Yet, the President's nondiscretionary duty to fill vacancies in vital government offices might sometimes create an obligation to use whatever power is reasonably at his disposal to fill them. Given the lengthy debate at the Constitutional Convention regarding the regular appointment power, it is surprising that there was little or no debate regarding the expected uses of the recess appointment power.[15] At a minimum, however, the text and contemporary practice show that the Framers anticipated some circumstances in which it would be necessary for a President to act unilaterally to fill vacancies in important offices.

The necessity to fill a particular vacancy unilaterally does not depend on whether the Senate is unable to meet (the Framers' primary concern) or unable to end a parliamentary filibuster, except that a more lengthy impasse will make the unilateral appointment even more compelling. The Senate is not without the ability to extract a price if the President abuses his recess appointment power, but there is no reason to expect repercussions if the Senate's majority supports the President's choice of appointees.

An obligation to quickly fill important vacancies in the Judicial branch is more likely to arise than an obligation to fill vacancies in the Executive branch for several reasons. The Constitution vests all executive power in the President.[16] Although the President cannot exercise that power without advisers and assistants, he has great flexibility to delegate and re-delegate his authority when vacancies arise. In fact, almost every executive agency has published orders of succession, which are reviewed and revised periodically. One can imagine a situation in which the President might need to appoint a new ambassador to negotiate an alliance in time of war, but in normal circumstances, other officers could step in.

The judicial power, by contrast, is vested in the Supreme Court of the United States (a collegial body at that) and in all inferior courts that Congress creates.[17] Although magistrates and clerks may assist Article III judges, the judicial decision making power itself cannot be delegated. When the law establishing a sixteen-member U.S. Court of Appeals for the Sixth Circuit is thwarted by a handful of senators and vacancies linger for years, the other judges can only do so much to handle the circuit's workload.[18] If evidence emerged that those same senators who thwarted the confirmation of judges were motivated by a desire to manipulate the result in certain cases pending before that circuit,[19] that could easily undermine public confidence in the administration of justice. That would present an example of a dramatic need to quickly fill those vacancies, for there is little else the President could do that would be as effective in restoring confidence in administration of justice.[20]

The obligation of comity to a co-equal branch is the final reason why extended judicial vacancies will more likely present a compelling case for recess appointments than vacancies in the Executive branch. The President owes no obligation of comity to himself, and he is in a much better position to evaluate the needs of the Executive branch (are the duties of the vacant office properly delegated; should they be re-delegated?) than he is of evaluating the needs of the judiciary. If various federal courts are declaring judicial "emergencies," the President normally should take them at their word.

Whether a President should make a judicial recess appointment for constitutional or other purely prudential reasons will still depend on the facts and circumstances of each case. However, it may be helpful to consider three different categories of situations and then try to fit individual cases into this taxonomy:

1. Instances in which the President has the constitutional power to make judicial recess appointments, but it would be improper for him to do so.
2. Instances in which the President has the constitutional power to make judicial recess appointments and neither prudence nor duty dictate a particular result.
3. Instances in which the President has the constitutional power to make judicial recess appointments and either prudence or duty strongly suggest that such appointments be made.

The first category would include instances in which the vacancy does not present a judicial or other similar emergency, and the Senate has already affirmatively rejected the individual for the regular appointment who the President is considering giving a recess appointment. The President would have the constitutional power to grant a recess appointment to anyone during a Senate recess of about two weeks or more,[21] but it would be improper to use this power to install someone—even temporarily—who the Senate has already rejected. Although the President could grant the recess appointment, the Senate might rightly retaliate. In fact, Congress has enacted a law barring the pay of certain recess appointees. That law, which dates to perceived Civil War era abuses of the recess appointment power, has been amended many times but still includes a prohibition on paying certain recess appointees recently rejected by the Senate for a regular appointment.[22] Although that statute, codified at 5 U.S.C. § 5503, is somewhat arcane and complicated, the law supports the notion that some types of recess appointments are offensive to the Senate's rightful prerogatives and are improper.

The second category includes judicial recess appointments of well-qualified individuals who have not yet been nominated (whether they eventually will or not) and those whose pending nomination is likely to be confirmed by the Senate in due time. The importance of the court and the nature of any judicial emergency are also relevant in deciding whether a particular judicial recess appointment is prudent. The informal advice of the Senate leadership and Chairman of the Senate Judiciary Committee would be relevant in ascertaining likely Senate reaction. This is the category where the President's discretion ought to be respected. Depending on how long the vacancy has been pending prior to the recess and other factors, most such recess appointees can be paid under 5 U.S.C. § 5503.

The third category includes instances in which the vacancy is especially long-standing or there is some other judicial need to fill the position and the recess appointee is a qualified person who has not been rejected by the Senate for the regular appointment. The situation is even more compelling if it appears that the Senate is unlikely to take action on a nomination for the lifetime position in the near future—the reason the Framers drafted the Recess Appointments Clause in the first place—or the Senate's inaction is based on an improper motive. A strong case might present itself if there were multiple vacancies on the Supreme Court and the Senate was delaying action on all nominations in order to affect the outcome of cases pending before the Court.

Still more would need to be known about each situation before an argument could be made that the President was neglecting a duty to make recess appointments—and reasonable people may differ about whether a particular fact pattern fits a particular category above. On December 27, 2000, President William Clinton granted a recess appointment to Roger Gregory to serve as a circuit judge on the Fourth Circuit Court of Appeals on facts that make categorization difficult. The vacancy technically was very long-standing (which automatically rendered it a "judicial emergency") but it was for a new seat on the court that had never been filled;[23] indeed, some (including the chief judge of the circuit) argued that the seat was unnecessary and should be eliminated.[24] Roger Gregory's nomination for the regular appointment had not been formally rejected by the Senate, but it had only been pending a few months in the preceding session and there was some indication it would face opposition from senators who thought the seat should not be filled by someone from Virginia—if it was filled at all.

Judge Gregory was subsequently confirmed for a regular appointment because President George W. Bush's renomination of Gregory (which many saw as a good-will gesture) and additional home state support helped change the political dynamics in the Senate. That development does not alter the facts as they existed at the end of President Clinton term, but some would argue that it proves his judgment was correct that Roger Gregory was not offensive to the Senate, and thus, worthy of a recess appointment. Others argue it was an example of improper racial politics, given the justification Clinton made for the nomination and subsequent recess appointment.[25] The discussion of Gregory's appointment above is abbreviated (the racial charges and a debate about nominees from North Carolina are not detailed here),[26] but the existence of a complex case does not mean there are no others that are clear. Facts that would make judicial recess appointments either improper or compelling do exist.

Reasonable people may differ on whether the current minority filibuster involving several important court of appeals vacancies (and other threatened filibusters) fits the second or third categories, but there ought to be widespread agreement that it is not improper for President Bush to make judicial recess appointments for the seats affected by the filibusters. The vacancies are all long-standing. Several of the courts in question have declared judicial emergencies and are handling cases with summary procedures that should not be continued indefinitely.[27] The nominees apparently all have majority support in the Senate such that they would be confirmed for a permanent seat if a final vote were ever taken. There is even evidence that some senators in the minority are manipulating the confirmation process to affect the outcome in particular cases. Whether that charge is true or not, it undermines confidence in the administration of justice in one federal circuit court that is already straining under formal accusations of misconduct.

The argument for President Bush's use of his recess appointment power is also supported by three other facts. First, the President has shown extreme patience (perhaps too much patience) up to now,[28] while he has continued to urge the Senate to discharge its duty. In a public speech on October 30, 2002, he established a time-

table for action on all judicial vacancies.[29] He has kept his word on nominating qualified individuals for each vacancy within a reasonable time period, and he has repeatedly alerted the Senate and the public to the consequences of the Senate's failure to fulfill its responsibilities. No failure of leadership or laches-like argument can be made. The judiciary has also repeated its plea for action in various ways, and the organized Bar (through the left-leaning ABA) has condemned the Senate's inaction as well.

Second, the chance for final action in the Senate on the blocked court of appeals nominees seems extremely remote in 2004. In November 2003, the Senate majority conducted an historic thirty-nine-hour uninterrupted "Justice for Judges" debate. Yet, the Senate appears no closer to ending the minority filibuster. Perhaps the Senate will change its rules in 2004 or issue a parliamentary ruling that extended filibusters of presidential nominations are unconstitutional, but such action does not appear imminent. Thus, all other reasonable options available to the President have been tried and failed.

Finally, although those who support the improper filibuster would likely claim that any judicial recess appointments in 2004 are politically motivated, presidential inaction is also likely to be characterized that way. At almost every one of his campaign stops during the 2002 congressional elections, President Bush lamented his stalled judicial nominees and urged the election of GOP senators to return control of the Senate to the GOP. If the President does little in 2004 to fill the vacancies held up by filibuster except urge the election of more GOP senators, the public may grow increasingly cynical that the judicial impasse is being kept alive for partisan purposes. President Bush's contrary intentions would not matter as much as the perception that is growing with politically active citizens that the White House wants a salient election issue more than it wants to end judicial emergencies.[30]

Politicizing the judicial confirmation process further should be avoided at all cost. Making judicial recess appointments will not do much to solve the confirmation crisis (and cuts both ways with regard to political perceptions), but it would demonstrate that President Bush really cares about the judicial emergencies and he is not merely interested in installing lifetime judges who share his political ideology or using judicial emergencies to dramatize his electoral objectives in the Senate. The ultimate solution to the current confirmation stalemate is a Senate rule change that is inherently non-partisan for the simple reason that it is almost inconceivable in modern times that the filibuster rule, once eliminated or democratized, can be made less democratic again.[31]

If the President did make a recess appointment in 2004, several commentators (including this author) have suggested that the President would be wise to grant temporary commissions to individuals other than those who were nominated for the lifetime position.[32] Many of the nominees whose confirmation is pending might prefer this option. The following additional advantages of this approach are discussed in the Judicial Recess Appointments article relied upon above:

> Such individuals, unlike recess appointees who are also nominees for permanent appointments, would not be under any political pressure to temper their decisions in order to ensure confirmation. And such recess appointments might better highlight the gridlock in the nominations process than appointments of individuals who have already been nominated. Specifically, in making such an appointment, the President points out in a tangible way that a few Senators engaged in the filibuster of a pending nominee are causing the Senate to abdicate its responsibility to provide an up-or-down vote, and because someone else has been only temporarily appointed, the Senate *still* has a duty to cast a vote for the pending nominee.[33]

Another possible advantage of this approach is that it eliminates any incentives senators may have to hold seats open to affect cases in a particular circuit. There may even be an added incentive for obstructionist senators to allow a vote on the permanent nomination, since the confirmation and regular appointment may well end the tenure of a judicial recess appointee.[34]

The larger question remains whether the current stalemate regarding important court of appeals vacancies justifies the President's use of his recess appointment power. One can imagine other facts that would make the use even more compelling, but a very strong case exists now for President Bush to fill several of the vacancies with judicial recess appointments. A President should not suffer an entire four-year term of office with a minority of the Senate holding up the vote on important nominations, and he may owe a duty to the judiciary to see that its work can proceed despite the Senate's conduct.

* Mr. Gaziano is the Director of the Center for Legal and Judicial Studies at The Heritage Foundation and a member of the Executive Committee of the Federalist Society's Federalism & Separation of Powers Practice Group. Between the preparation of this article and press time, President Bush made at least one recess appointment to a federal appellate court. On January 16, 2004, the President recess appointed Charles Pickering to the United States Court of Appeals for the Fifth Circuit. The arguments in this article remain important in evaluating whether recess appointments are appropriate for the vacancies still remaining in federal appellate courts (ten of which were deemed "judicial emergencies" at the time this article went to press).

Footnotes

[1] U.S. Const. art. I, § 7, cl. 2-3.

[2] Some temporal limits apply indirectly to restrict the ability of one branch to inappropriately augment or diminish the power of another branch. *See, e.g., id.* art. I, § 8, cl. 12 (limiting military appropriations to no longer than two years, a provision that requires congressional action at least biennially to fund the military under the President's command); *id.* art. III, § 1 (preventing Congress and the President from reducing any judge's pay during his or her tenure).

[3] *See* Line Item Veto Act, Pub. L. No. 104-130, § 3, 110 Stat. 1200, 1211 (1996).

[4] *See* U.S. Const. art. II, § 2, cl. 2. Although federal judges serving on district and appellate courts may not consider themselves "inferior Officers" whose appointment may by law be vested in the President alone, a strong argument can be made that they are both inferior judges within the meaning of Article III, § 1, and inferior officers within the meaning of the Appointments Clause. *See*, *e.g.*, *A Judiciary Diminished is Justice Denied: The Constitution, The Senate, and the Vacancy Crisis in the Federal Judiciary: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. 22 (2002) (testimony of Todd F. Gaziano), *available at* http://www.house.gov/judiciary/82264.PDF [hereinafter Testimony of Todd F. Gaziano]; Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. Rev. 273, 323-24 (1989); *see also* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 807 n.232 (1999); Christopher L. Eisgruber, *Politics and Personalities in the Federal Appointments Process*, 10 Wm. & Mary Bill Rts. J. 177, 178 n.10 (2001); Paul Taylor, *Filling Judicial Vacancies and Strengthening the Separation of Powers Through the Appointments Clause: A Legislative Proposal*, 1 Geo. J.L. Pub. Pol'y 227 (2003). *But see, e.g.*, Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 Yale L.J. 255, 275 n.103 (1992).

[5] A majority of senators have voted to end each of the filibusters preventing final votes on the confirmation of Miguel Estrada, Priscilla Owen, William Pryor, Charles Pickering, Carolyn Kuhl, and Janice Brown. The possible parliamentary options available to the Senate majority to end the filibusters, other than attaining 60 votes to invoke "cloture" and end debate, have been the subject of much commentary and legislative discussion. *See, e.g.*, *Hearing on Senate Rule XXII and Proposals to Amend This Rule: Before the Senate Comm. on Rules and Admin.*, 108th Cong. (2003), *available at* http://rules.senate.gov/hearings/2003/060503_hearing.htm; *Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 108th Cong. (2003), *available at* http://judiciary.senate.gov/hearing.cfm?id=744. It is not necessary for purposes of this essay, however, to evaluate whether the Senate majority has done everything it can to fulfill its constitutional obligations. Whether the obstructionist minority deserves all or only a great majority of the blame for the Senate's failure is largely immaterial to the President's remaining options and responsibilities.

[6] U.S. Const. art. II, § 2, cl. 2. Such treaties go into effect if two-thirds of the Senate consent to their ratification. *Id.*

[7] *Id.* (emphasis added).

[8] *Id.* art. II, § 2, cl. 3.

[9] Justice Joseph Story, in his influential *Commentaries on the Constitution*, argued that the wisdom of the Recess Appointments Clause was so obvious that it "can require no elucidation": It eliminated the need for the Senate to "be perpetually in session," which would have been "burthensome to the senate, and expensive to the public." 3 Joseph Story, Commentaries on the Constitution, § 1551 (1833), *available at* http://www.constitution.org/js/js_000.htm.

[10] 1 Op. Att'y Gen. 631 (1823).

[11] Stuart Buck, James C. Ho, Brett H. McGurk, Tara Ross, & Kannon K. Shanmugam, Judicial Recess Appointments: A Survey of the Arguments (2004) (Federalist Soc'y for Law & Pub. Policy Studies, White Paper), *available at* http://www.fed-soc.org/pdf/recapp.pdf [hereinafter Judicial Recess Appointments].

[12] The information in this paragraph is taken from Judicial Recess Appointments, *supra* note 11, at 2 & app. A-C.

[13] *Id*. Appendix C lists every known judicial recess appointee by President, the length of the vacancy prior to appointment and the ultimate action on the judges' subsequent nomination, if any.

[14] U.S. Const. art. II, § 1, cl. 8.

[15] There seems to be no record of any debate at the Constitutional Convention over the Recess Appointments Clause itself. It was added without apparent disagreement on a motion by Richard D. Spaight. *See* James Madison, The Debates in the Federal Convention of 1787, *available at* http://www.constitution.org/dfc/dfc_0907.htm (reciting the debate on Friday, September 7, 1787). The amendment followed a recurrent debate at the Convention regarding the scope of the President's appointment power—or what became the President's appointment power. In some intermediate versions of the Clause, the President would need Senate approval to appoint specified officers, but would have unilateral power to appoint all other officers not otherwise provided for in the Constitution. That proposal was amended to require Senate approval of all appointments except such officers whose appointment by law was vested in another entity (which entities were still being debated at the time of Spaight's amendment, but included the President and the state legislatures).

[16] U.S. Const. art. II, § 1, cl. 1. The Framers wisely rejected a plural executive, preferring "energy in the executive" instead. For a defense of this decision, see The Federalist No. 70 (Alexander Hamilton), *available at* http://memory.loc.gov/const/fed/fed_70-2.html.

[17] U.S. Const. art. III, § 1.

[18] *See, e.g.*, Testimony of Todd F. Gaziano, *supra* note 4, at 8 (discussing the "Effects of Prolonged Judicial Vacancies on the Courts and the Administration of Justice").

[19] *See, e.g.*, Coalition for a Fair Judiciary, *Democrats on Judges*, *at* http://fairjudiciary.campsol.com/cfj_contents/press/judges.pdf (last visited Jan. 8, 2003) (compiling memos from Democratic Senate staff to their employers and discussing evidence that some Democratic Senators may have attempted to manipulate the outcome of the Michigan racial preferences case); *see also* Melanie Kirkpatrick, *The Sound of Silence*, Wall St. J., Dec. 2, 2003, at A18 (discussing Democratic strategy memos on President Bush's blocked appellate court nominees).

[20] *Cf.* Todd F. Gaziano, Heritage Foundation, Judicial Misconduct in the Sixth Circuit: Another Reason to Free the Michigan Four (2003), *available at* http://www.heritage.org/Press/Commentary/ed072803b.cfm; Testimony of Todd F. Gaziano, *supra* note 4, at 28-31 (discussing the harms to the administration of justice when prolonged vacancies occur); *see also* Grutter v. Bollinger, 288 F.3d 732, 810-14 (6th Cir. 2002) (Boggs, J., dissenting) (arguing that the en banc vote in the case was improperly held up until after the resignation of two circuit judges appointed by Republican Presidents).

[21] Supported by several Attorney General and Office of Legal Counsel Opinions, the President has exercised his recess appointment power during both intersession recesses (between sessions) and intrasession recesses (within a given session of the Senate) if the recess is of sufficient length. *See* Judicial Recess Appointments, *supra* note 11, at 8-10. Attorney General opinions have suggested that Senate recesses of thirty days or longer suffice, but

that recesses lasting five or even ten days may be insufficient. *See, e.g.*, President—Appointment of Officers—Holiday Recess, 23 Op. Att'y Gen. 599 (1901), *available at* 1901 U.S. AG LEXIS 1. However, a 1993 Department of Justice suggested that any recess in excess of three days may be sufficient to support a recess appointment. *See* Judicial Recess Appointments, *supra* note 11, at 10. There have been a few recess appointments made during breaks of about ten days, but that practice is relatively recent and has not been subject to court challenge. *See id.*; *see also* Louis Fisher, Congressional Research Service, Recess Appointments of Federal Judges 4 (2001).

[22] The current version is at 5 U.S.C. § 5503 (2000).

[23] *See* Peter Hardin, *Gregory Nominated for Court*, Rich. Times Dispatch, July 1, 2000, at A1 (discussing creation of the new seat in 1990). Although the issue was not raised by any senator at the time of Gregory's recess appointment or subsequent confirmation, senators in the founding era did object to a President's use of the recess appointment power to fill offices that had never had an incumbent office holder, a practice they argued was not authorized by the Recess Appointments Clause. *See* David P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801, at 154 n.168 (1997); David P. Currie, The Constitution in Congress: The Jeffersonians, 1801-1829, at 188 & 200 n.62 (2001).

[24] *See* Peter Hardin, *Richmonder Considered for U.S. Court: Gregory Recommended to Fill Vacancy*, Rich. Times Dispatch, June 30, 2000, at B1 (noting that Senator Jesse Helms and the Chief Judge of the Fourth Circuit, J. Harvie Wilkinson III, have both supported shrinking the court); John Wagner, *Clinton Takes Helms to Task*, News & Observer (Raleigh, NC), July 14, 2000, at A1 (reporting Helms' position that more Fourth Circuit judges are unnecessary and, as a matter of fiscal responsibility, unneeded judges should not be added to the federal payroll).

[25] *See, e.g.*, *The Week*, Nat'l Rev., Aug. 14, 2000 ("Within two weeks, Clinton was complaining that Senate Republicans were holding up the nomination because Gregory is black. (Never mind that it took Clinton seven years to come up with a nominee.) . . . Said [Judiciary Chairman Orrin] Hatch, 'I call on President Clinton and Al Gore to put an end to this game of race-baiting politics.'"); Jesse J. Holland, *Senate Accused of Racism on Judges*, Associated Press, July 19, 2000 (noting the push for Gregory to be confirmed, since no African-American had ever been confirmed to the Fourth Circuit).

[26] The North Carolina seat was tied up amid charges and countercharges of delay, which also dated back ten years. Democrats blamed Senator Jesse Helms for the fact that North Carolina would not be represented on the Fourth Circuit, since he had blocked two recent candidates from his state. *See* Holland, *supra* note 25 (quoting Rep. Mel Watt, D-N.C., who stated that "if we can't get an African-American North Carolinian on the court [because of Sen. Helms], [then] we need to at least get one African-American from somewhere on that court"). But Senator Helms had grounds to complain that at least one of the seats should have been filled by nominees who the Democrats blocked in the first Bush Administration. *See, e.g.*, David G. Savage, *Bush's Judicial Nominees Go 28 for 80 in the Senate*, L.A. Times, Dec. 31, 2001, at A12 (discussing the failed nomination of Terrence Boyle to the Fourth Circuit in 1992 and Helms' decision to block Clinton's judicial nominees from North Carolina).

[27] For a discussion of some of these procedures, see Testimony of Todd F. Gaziano, *supra* note 4, at 28-31.

[28] As early as 2002, some commentators began to argue that the President should make judicial recess appointments. *See*, *e.g.*, Chad Groening, *Should Bush Make Pickering a Recess Appointment?*, AgapePress (Mar. 22, 2002), *at* http://headlines.agapepress.org/archive/3/222002c.asp; *see also* Victor Williams, *Why President Bush Should Use Recess Appointments to Fill Wartime Vacancies*, Findlaw.com (Jan. 1, 2002), *at* http://writ.news.findlaw.com/commentary/20020101_williams.html.

[29] President George W. Bush, Remarks by the President on Judicial Confirmations (Oct. 30, 2002) (transcript available at http://www.whitehouse.gov/news/releases/2002/10/20021030-6.html).

[30] *See, e.g.*, Stuart Shepard, *Group Calls for Recess Appointments*, Focus on the Family (Oct. 14, 2003), *at* http://www.family.org/cforum/fnif/news/a0028370.cfm (urging the President to "stop playing political dodgeball"); *see also* Alexander Bolton, *Bush Urged: Seat Judges Over Recess*, The Hill (Nov. 12, 2003), *at* http://www.hillnews.com/news/111203/judges.aspx (discussing the upcoming election and quoting Richard Lessner, the executive director of the American Conservative Union, who stated "A number of conservatives think Bush could dramatize what is happening in the Senate, draw a line in the sand by making a recess appointment or two"); *cf. Pro-Life Group Wants Recess Appointment of Bush Nominees*, Townhall.com (Sept. 17, 2003), *at* http://www.townhall.com/news/politics/200309/POL20030917a.shtml (urging the President to counter judicial "tyranny" by making recess appointments, rather than worrying about political considerations).

[31] *See* Todd Gaziano, *The Senate Can Change*, Nat'l L.J., June 16, 2003.

[32] *See* Paul Rosenzweig & Todd Gaziano, *It's Time to Solve the Judicial Confirmation Crisis*, Townhall.com, (May 9, 2003), *at* http://www.townhall.com/columnists/guestcolumns/Gaziano20030509.shtml; Kate O'Beirne, *The Joy of Recess: An Idea for Countering Democratic Filibustering*, Nat'l Rev., Oct. 13, 2003, at 19.

[33] Judicial Recess Appointments, *supra* note 11, at 14.

[34] For Executive branch recess appointees, the tenure set forth in the Recess Appointments Clause (the end of the Senate's next session) is the outer limit of their lawful commission and provides no protection against their tenure being cut short. This is true whether the regular office holders have an indefinite tenure or a fixed term of years. The matter is more complicated for judicial recess appointees than is even the case for executive branch recess appointees in positions with statutory "for cause" removal protection. There appears to be no record of this issue arising with respect to judicial recess appointees, but a justiciable case could not arise unless a judicial recess appointee refused to resign his commission upon the confirmation and appointment of a judge for the lifetime position.