POLITICAL DEADLOCKS AND THE CONSTITUTIONAL DUTY TO CONFIRM

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INTRODUCTION

Imagine that the year is 2050. Decades of shifting political alliances and doctrinal realignments have resulted in a true quirk of history: not since 2008 have the President and the Senate majority belonged to the same party. This phenomenon has proven intensely frustrating for both parties—which have maintained their structural integrity and resisted the impulse toward fragmentation. Accordingly, the extreme political polarization between right and left, a polarization that first took root in the late 2000s, has only grown worse and worse with the passage of time. Formerly routine political disagreements are now characterized by unprecedented levels of rancor, and obstructionism has become a defining feature of the legislative process.

Most notably, the judicial appointment process—more specifically, the process by which the Senate renders "advice and consent"—has become impenetrably intransigent. Beginning with the failed 2016 nomination of Judge Merrick Garland, both political parties have realized that nominating new Justices risks placing hard-won Court precedents at risk. By 2050, only two Supreme Court justices are left alive: Chief Justice Roberts is 95, and Justice Kagan is 90. The status quo has become a brutally nihilistic stare down in which both parties—and the voters who support them—refuse to blink. Even the possibility of a moderate nominee has been negated: legislators are well aware that an increasingly vitriolic electorate will view any concessions as betrayals, and accordingly refuse to countenance even the faintest hint of political compromise. The incentives identified by choice theory have generated a fiendish Gordian knot.[1]

In this counterfactual, something has very clearly gone awry, to the point that the basic constitutional order itself is in jeopardy. Without a Senate willing to entertain the President's nominees, the possibility is very real that within a short time, there will be no Justices sitting on the Supreme

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[1] *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13 (1976) (suggesting that legislators' paramount goal is reelection); *see also* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 288 (1988) (exploring similar tendencies in legislators' behavior).

Court. This scenario might seem extreme and unlikely, but it is *not impossible.*

The vicious terminus of this hypothetical evinces an important principle: *under the Constitution, there must necessarily be some ultimate point at which a congressional duty to confirm the President's judicial nominees—particularly to the Supreme Court—may be cogently said to exist.*

Naturally, any project commenting on the spectral form of this distant duty risks venturing onto potentially treacherous ground. The mere mention of such a duty may be viewed as a direct attempt to usurp the Senate's approval prerogative—to invoke a worst-case constitutional crisis scenario as a justification for sidestepping the constitutionally prescribed procedures for confirmation judicial nominees. But aside from the politically charged conditions of the present moment, the question ought not be ignored: *in extremis*, when obstructionism reaches its nadir, what recourse do the political branches have?

Having begun with a worst-case scenario that strongly suggests the existence of a constitutional duty to confirm judicial nominees at some ultimate point, this Essay works backward to probe the roots underlying, and repercussions of acknowledging, this duty. It first seeks to explore the rationale for such a duty in greater depth—a rationale that unfolds along both constitutional and pragmatic lines—before considering how such a duty might be meaningfully operationalized in a way that minimizes separation-of-powers-concerns. Centrally, this Essay proposes—as a solution to the counterfactual's envisioned crisis—that the President's recess appointment power be construed, in limited fashion, to allow for temporary Court appointments under conditions of persistent congressional deadlock. This may well be the best—or, more accurately, the *least bad*—way by which constitutional obligations may be properly discharged and an orderly federal system maintained.

I. THE UNAVOIDABLE SPECTER OF A DUTY TO CONFIRM

Beyond one's instinctual negative reaction to the crisis scenario laid out above, both philosophical and pragmatic rationales—both of which implicate foundational constitutional principles—exist which support the existence of a congressional duty to confirm the President's Supreme Court nominees. The philosophical rationale may be summarized as the constitutionally prescribed contingency of the judicial branch upon the legislative and executive branches; the pragmatic rationale may be summarized as the structural need to avoid judicial dysfunction at the highest level of authority.

A. *The Ontological Contingency of the Federal Judiciary*

The principle that the President and Senate both exist temporally and conceptually prior to the judiciary has its roots in historical fact. The Supreme Court did not exist, in any functional capacity, until President George Washington signed into law the Judiciary Act of 1789 and nominated six Justices—John Jay, John Rutledge, William Cushing, Robert H. Harrison, James Wilson, and John Blair, Jr.—to the Court.[2] In essence, the judicial branch is *ontologically contingent* upon the proper functioning of the other branches: its existence depends upon institutions and operations extrinsic to itself. Failures in the proper functioning of those branches vis-à-vis the judiciary are not always immediately remediable; if the President nominates no judges, the judiciary cannot independently exercise a function of appointment. Article I and the Seventeenth Amendment set out controlling principles for legislative elections,[3] and Article II prescribes suitable procedures for executive branch elections,[4] but the central actors of Article III may only accede to office through the actions of other branches.[5] Juxtaposed against the executive and legislative branches, the judicial branch decisively has the most attenuated connection to the ordinary electoral process, given that its membership is comprised of individuals nominated by the President and confirmed by the Senate.[6] In short, the federal judiciary lacks a built-in constitutional means for internally replenishing its ranks.

It bears mention that the accountability structures within the two conceptually prior branches differ from one another. If the President abdicates his constitutional duty to the judiciary, recourse theoretically exists: the presidential line of succession, as established by the Constitution,[7] and the Presidential Succession Act of 1947.[8] Both of these structures allow for

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2 *Who Were the First Six Supreme Court Justices?* CONST. DAILY (Feb. 1, 2016), http://blog.constitutioncenter.org/2016/02/who-were-the-first-six-supreme-court-justices/.

3 U.S. CONST. art. I; U.S. CONST. amend. XVII.

4 U.S. CONST. art. II § 1.

5 *Id.* § 2; *see also* Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y 103, 109 (2005) (discussing in detail the historical process by which the "advice and consent" language was shaped by the Framers' debates and incorporated into the Constitution). Significantly, White concludes his article by noting that "[d]espite suggestions by the President, various Senators, and numerous commentators that the Senate has a constitutional obligation to act on judicial nominations, the text of the Constitution contains no such obligation." *Id.* at 147. Here, semantics matter: there is a difference between the propositions "the Senate has a constitutional obligation to act on *any given judicial nomination*" and "the Senate has a constitutional obligation to act on *judicial nominations in general*." The existence of this difference is the catalyst triggering the need for creative problem solving; *see also* 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 227 (1756) (defining the word "of").

6 U.S. CONST. art. II § 2.

7 U.S. CONST. art. II § 1; U.S. CONST. amend. XX § 3; U.S. CONST. amend. XXV.

8 Pub. L. No. 80-771 § 19, 62 Stat. 677 (codified as amended at 3 U.S.C. § 19(e) (2012)).

successors to the president, who might more be more willing to perform their constitutional responsibilities, to assume executive power. No such orderly structure for devolution of power, in the event of individual incapacity, exists in the legislature. Accordingly, a potential pathway already exists for remediating the President's failure to perform his nomination duty; hence, this Essay's narrower focus on the legislature's duty to confirm presidential nominees.

It is a core principle that the judiciary—or, at the very least, the "supreme Court"[9]—must *exist* in some way in order to conform to the Constitution's structure. Article III of the Constitution vests judicial power in a Supreme Court, the existence (and continuance-in-existence) of which is inherently presumed: the Supreme Court is a core part of the constitutional order. This line of reasoning necessarily leads to a somewhat metaphysical question: does the *institution* of the "supreme Court" have an independent, reified existence within which the judicial power may be vested even if is never operationalized?[10] Or, put another way, does it meaningfully matter, for constitutional purposes, if the judicial power is never exercised?

Let us revisit the preceding counterfactual: it is now 2060 and both Chief Justice Roberts and Justice Kagan have died. The Court is vacant. One might imagine an emergent crisis scenario in which the "judicial power" is *technically* vested within a constitutionally defined institution (the "supreme Court") but the Court is wholly vacant. In this crisis scenario, federal circuit courts of appeal might continue to preside over their respective groupings of state, handing down constitutional interpretations, but no *new* resolutions of constitutional disputes would proceed from the Supreme Court. The Court would, in effect, be an empty shell, imbued with adjudicative power it could never actualize. Such a concept of the Court could be described as "reified, but impotent."

The Constitution forbids this scenario. Careful attention to the meaning of the constitutional text both strongly supports an anti-reification view and recognizes that the presence of actual judges is an irreducible element of the Court. Samuel Johnson's 1755 tome *A Dictionary of the English Language*—the dictionary that the Framers were probably most likely to have encountered—defines "power" as "[c]ommand; authority; dominion;

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9 U.S. CONST. art. III § 1.

10 This question—whether the Court has an existence apart from the members that ostensibly comprise the Court—evokes Bertrand Russell's famous paradox ("Russell's Antinomy"), the legendary mathematical quandary regarding whether or not a set can contain itself. *See* BERTRAND RUSSELL, THE PRINCIPLES OF MATHEMATICS § 500 (1903). Similarly, the philosophical position of mereological nihilism argues that the existence of fundamental parts does not translate into an independent metaphysical existence of those higher-order things that the fundamental units comprise. *Compare* PETER VAN INWAGEN, MATERIAL BEINGS 5, 18, 20 (1995) (laying out the case for this position) *with* Michael C. Rea, *In Defense of Mereological Universalism*, 58 PHIL. & PHENOMENOLOGICAL RES. 347 (1998) (rebutting van Inwagen). This Essay does not take a position on the underlying mereology in question, but instead contends that the dilemma is properly resolved as a matter of historical-linguistic interpretation.

influence. . . . [i]nfluence; prevalence upon. . . . [a]bility; force; reach. . . . [s]trength; motive force."[11] Thus, "power" should not be understood in terms of *capacity to act*, but *actual action*; an institution within which power is vested, but which has no capacity to exercise that power, certainly displays no "motive force." Accordingly, Article III's "judicial power" ought to be read with the understanding that the Court must be more than an abstract institutional construct within which an inactive power is vested.

The Constitution's allocation of power to the President to appoint "[j]udges *of* the supreme Court"[12] similarly supports an anti-reification view. Johnson defines "of" as denoting a participatory relationship between the nominative and genitive forms of nouns within a given construction. "It is put before the substantive that follows another in construction; as *of these parts were slain*; that is, *part of these*."[13] Given Johnson's definition, it makes sense to recognize that judges *actually constitute* the Supreme Court; they do not proceed out from an independently existing, reified Court-construct. In short, the Court does not exist without judges, and Articles II and III necessitate that judges sit on a Supreme Court that actually exerts influence.

This inquiry may seem dilatory or banal, but it is in fact pivotal. To assert that a legally cognizable duty to confirm exists requires a showing that the obligations inherent in the constitutional structure may not be met via a logical, if unorthodox, solution (ceremonially delegating power to an empty Court). But in the words of Alfred Korzybski's famous dictum, "[a] map *is not* the territory it represents"[14]—a reified Court-construct is *not* the constitutionally mandated "supreme Court." Thus, the constitutional impermissibility of an empty Court—and the theoretical potential for this crisis scenario to obtain—imposes a corollary duty upon the Senate: somehow, at some point, the Senate must confirm a nominee of the President in order to maintain the institutions the Constitution mandates.

This issue rests at the very heart of Supreme Court appointment and confirmation controversies, but has been generally under-analyzed by contemporary constitutional theorists. For instance, during public debate over the 2016 nomination of Judge Merrick Garland to fill the Court vacancy left by the passing of Justice Antonin Scalia, the Alliance for Justice circulated a letter signed by a number of leading constitutional scholars, including Laurence Tribe and Erwin Chermerinsky. The letter urged the Senate leadership to fulfill their "constitutional duty to give President Barack Obama's Supreme Court nominee a prompt and fair hearing and a timely vote," and argued that "[t]he Senate must not defeat the intention of the Framers by

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11 2 SAMUEL JOHNSON, *supra* note 5, at 368.

12 U.S. CONST. art. II § 2 (emphasis added).

13 2 SAMUEL JOHNSON, *supra* note 5, at 204.

14 ALFRED KORZYBSKI, SCIENCE AND SANITY: AN INTRODUCTION TO NON-ARISTOTELIAN SYSTEMS AND GENERAL SEMANTICS 58 (5th ed. 1994).

failing to perform its constitutional duty. The Senate Judiciary Committee should hold a prompt and fair hearing and the full Senate should hold a timely vote on the president's nominee."[15] The letter triggered a counter-reaction from legal scholars who disagreed with this characterization, among them Professor Vikram Amar:

> Some analysts have argued that the Senate has a "duty" to hold hearings and vote on a President's nominee. It is hard to see where such a legal duty comes from. The text of the Constitution certainly does not use any language suggesting the Senate has a legal obligation to do anything . . . . And since a president can always decline to issue a commission to a justice, it is not even clear that the president is under any mandatory legal duties here.[16]

The dispositive word in Amar's argument is "here"—which, arguably, is a reference to *the immediate status quo* rather than to *the constitutional order as a whole*. Because of the ultimate contingency of the judiciary upon the actions of the executive and legislative branches, the President and Senate indeed *do* have a mandatory legal duty at some stage of the process. In light of the reality that such a duty is cognizable and real, such a duty has implications "downstream" for the obligatory framework binding the President and Senate.

Ed Whelan reached a similar conclusion as Amar, casting the issue in terms of legislative independence:

> The Appointments Clause . . . restricts the president's power to appoint executive-branch and judicial-branch officers by conditioning any such appointment on prior receipt of the Senate's "Advice and Consent" on a nomination. It says nothing about how the Senate should go about exercising its power to advise and consent-or-withhold-consent, and it thus leaves the Senate entirely free to exercise that power however it sees fit.[17]

As before, however, the Senate's exercise (or non-exercise of that power) must be conceptually cabined at some point; the constitutional order does not allow for an indefinite abdication of the duty to act.

Hewing closer to the core argument of this Essay—the argument that, working in reverse from the fact of potential constitutional crisis, one may inductively reason towards, and justify, the existence of a duty to confirm—Professor Noah Feldman has observed that "[f]rom the fact that the lower

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15 *Letter from Law Professors to Senate Leaders*, ALLIANCE FOR JUSTICE (Mar. 7, 2016), http://www.afj.org/wp-content/uploads/2016/03/Law-professor-SCOTUS-vacancy-letter.pdf.

16 *See* Vikram David Amar, *The Grave Risks of the Senate Republicans' Stated Refusal to Process any Supreme Court Nominee President Obama Sends Them*, VERDICT (Feb. 26, 2016), https://verdict.justia.com/2016/02/26/the-grave-risks-of-the-senate-republicans-stated-refusal-to-process-any-supreme-court-nominee-president-obama-sends-them.

17 *See* Ed Whelan, *More Law Professors Behaving Badly*, NAT'L REV. (Mar. 9, 2016), http://www.nationalreview.com/bench-memos/432525/law-professor-letter-senate-power.

courts are optional, you can deduce that the Supreme Court isn't."[18] He goes on to note that "the size of [the Supreme C]ourt is left undefined. In theory, I think, it could consist of a single judge. The interpretation of the Constitution would rest [in] his hands. You could even call him Anthony Kennedy."[19]

Professor Feldman stops short, however, of tracing the full implication of his argument: if the hypothetical sole Justice dies or retires, how is the "non-optional" nature of the Supreme Court to be actualized? Again, confronted with the stark reality that when the constitutional order is pressed to the limits, the Senate must have a cognizable duty to act.

Given the contextually fraught character of any argument of this nature, it bears reiteration that the proposition that the Senate has a constitutional duty to consent to *whichever nominee the President proposes* is a much narrower claim than one recognizing the existence of a distant duty, and not one this Essay makes. The solution this Essay proposes is *not* a compelled formal confirmation of an undesirable nominee, a confirmation carrying with it the potential for life tenure during "good Behaviour."[20] The Senate does have a constitutional obligation to confirm nominees in the abstract; how that translates into concrete praxis is a far more fraught question.

B. *Structural Ramifications of Perpetual Judicial Dysfunction*

Wholly apart from the constitutional imperative that actual judges must be seated on the Court in order for Article III to make textual and theoretical sense, essential structural features of the American judiciary—first, the need for ultimate resolvability of constitutional questions, and second, the principles of federalism and dual state/federal sovereignty—illustrate the reality of a constitutional duty to confirm nominees and maintain a viable Supreme Court.

Consider the potential problem posed by *Zubik v. Burwell*.[21] *Zubik*, as heard by the Supreme Court, is actually a set of seven consolidated cases arising from proceedings in the Third, Fifth, Tenth, and D.C. Circuits.[22]

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18 Noah Feldman, *Obama and Republicans Are Both Wrong About Constitution*, BLOOMBERG VIEW (Feb. 17, 2016), http://www.bloombergview.com/articles/2016-02-17/obama-and-senate-are-both-wrong-about-the-constitution.

19 *Id.*

20 U.S. CONST. art. III § 1.

21 Zubik v. Burwell 136 S. Ct. 1557 (2016) (per curium).

22 The six other cases consolidated with *Zubik* are: Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422 (3d Cir. 2015), *cert. granted*, 136 S. Ct. 445 (2015); Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151 (10th Cir. 2015), *cert. granted sub nom.* Southern Nazarene Univ. v. Burwell, 136 S. Ct. 446 (2015); Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151 (10th Cir. 2015), *cert. granted*, 136 S. Ct. 446 (2015); E. Tex. Baptist Univ. v.

Cases raising similar legal issues have also been adjudicated in the Second, Sixth, Seventh, and Eighth Circuits; the Eighth Circuit's ruling diverged from the others, triggering the split that likely precipitated a grant of certiorari. Choking off the ability of the Supreme Court to meaningfully adjudicate these disputes—a circumstance that could arise from a persistent string of 4-4 decisions or from a hypothetically empty Court bench—leads to both pragmatic and constitutional problems.

In a scenario where *Zubik* cannot be resolved due to high-level judicial crisis, the prevailing constitutional interpretation in the Eighth Circuit[23] would be left in place—an interpretation fundamentally different from that which prevails in the Second, Third, Fifth, Sixth, Seventh, Tenth, and D.C. Circuits.[24] In effect, the residents of states within various circuits are thus subjected to the final authority of sub-federal entities comprised of ultimately arbitrary groupings of states, and the residents of these states would simultaneously lack the option of pursuing ultimate resolution. This is irreconcilable with the constitutional structure balancing dual sovereignties: a federal government in which all states are represented, and individual state governments themselves. Congress's maintenance of the circuit courts of appeal under such extreme conditions splinters federal power, [25] disrupting the constitutional design of vertical federalism by introducing a new sub-federal institutional structure possessed of ultimate adjudicative authority.

Importantly, this principle is not belied by the fact that the Supreme Court routinely denies petitions for certiorari, with the effect of leaving circuit splits in place. Circuit courts of appeal knowingly carry out their duties in the shadow of a Supreme Court that may, at any time, decide to hear a case and overturn circuit precedent or resolve a persistent split. An empty Supreme Court, or an impotent Court forever lacking the ability to hand down constitutional interpretations with binding nationwide effect, cannot exert this necessary downstream influence on lower courts. A Court neutered in such a way effectively sets up circuit judges as "Supreme Court Justices" of their own regions. This is patently unconstitutional. Article III

Burwell, 793 F.3d 449 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 444 (2015); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229 (D.C. Cir. 2014), *cert. granted sub nom.* Roman Catholic Archbishop of Wash. v. Burwell, 136 S. Ct. 444 (2015); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229 (D.C. Cir. 2014), *cert. granted*, 136 S. Ct. 446 (2015).

23 Dordt Coll. v. Burwell, 801 F.3d 946 (8th Cir. 2015), *vacated*, Burwell v. Dordt Coll., 136 S. Ct. 2006 (2016).

24 Mich. Catholic Conf. & Catholic Family Servs. v. Burwell, 807 F.3d 738 (6th Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); Grace Schs. v. Burwell, 801 F.3d 788 (7th Cir. 2015), *vacated*, 136 S. Ct. 2011 (2016); Catholic Health Care Sys v. Burwell, 796 F.3d 207 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450; Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016); *see also supra* note 22.

25 While the first Supreme Court was comprised of six Justices per the Judiciary Act of 1789, 1 Stat. 73 (1798), at that point the modern circuit courts of appeal had not yet been established (this latter being a result of the Judiciary Act of 1891, 26 Stat. 826 (1891)).

vests judicial authority in the Supreme Court "*and* in such inferior Courts as the Congress may from time to time ordain and establish"[26]: the vesting of judicial power is predicated on the assumption that a meaningful superior/inferior dichotomy between courts exists.

Thus, for both pragmatic and constitutional reasons, the depopulation of the Supreme Court bench *ad infinitum* is impermissible. It generates the potential for the ultimate irresolvability of federal constitutional questions, while also setting up a system of subordinate sovereignties (circuit courts of appeal) that diverges from the two-tiered constitutional structure. This scenario should not be countenanced.

II. A "LEAST BAD OPTION" FOR OPERATIONALIZING THE DUTY TO CONFIRM

In order to resolve the potential for constitutional crisis in the event of an irremediable presidential-congressional deadlock, this Essay proposes that the President's recess appointment power should be construed to allow temporary Court appointments where the Senate has abdicated its duty to offer "Advice and Consent."[27] The acknowledgement of a broad recess appointment power, both as historically contextualized and as reflected in *NLRB v. Noel Canning*,[28] constitutes a "least bad option" designed to mitigate the risk of constitutional crisis under difficult procedural conditions.

A. *The Recess Appointment Power as Constitutional Vehicle*

In the event of persistent congressional failure to confirm, or hold hearings on, Supreme Court nominees, the appropriate vehicle for preserving interbranch separation-of-powers while simultaneously recognizing the constitutional duty to maintain a viable judiciary could be a presidential action this Essay terms a *deadlock-breaking recess appointment*. A deadlock-breaking recess appointment, relying on the President's Article II authority to make recess appointments, would allow the President to temporarily seat a Justice until the end of Congress's next session, thereby enabling the continued function of the Supreme Court and rendering Article III's delegation of judicial power more than a dead letter. Thus, insofar as the Senate persistently fails to uphold its duty—a duty that is constitutional-

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26 U.S. CONST. art. III (emphasis added).

27 U.S. CONST. art. II § 2.

28 134 S. Ct. 2550 (2014).

ly cognizable—its inaction ought to be construed as tacit accession to the President's exercise of his Article II recess appointment authority.[29]

A broad construction of the recess appointment power under these rare circumstances may be justified by way of contemporary Supreme Court precedent and congressional history. The case for this authority hinges centrally on an appropriately broad interpretation of what constitutes a "recess" for the purpose of Article II, section 2—breadth the Supreme Court itself suggested in *NLRB v. Noel Canning.*

> Founding-era dictionaries define the word "recess," much as we do today, simply as "a period of cessation from usual work." . . . The constitutional text is thus ambiguous. And we believe the Clause's purpose demands the broader interpretation. The Clause gives the President authority to make appointments during "the recess of the Senate" *so that the President can ensure the continued functioning of the Federal Government when the Senate is away*.[30]

In so ruling, the Court affirmed the correctness of a purposive interpretation for the constitutional provision at issue. This orientation towards purpose was not without historical backing: in *Federalist No. 67*, Alexander Hamilton noted the practical concerns—namely, the supervening imperative to fulfill the public duties of particular offices—underlying the grant of recess appointment authority to the President.

> [A]s it would have been improper to oblige this body to be continually in session for the appointment of officers and as vacancies might happen *in their recess*, which it *might be neces-*

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29 This idea of inaction being understood as tacit accession to presidential action is not without precedent in the contemporary literature. *See, e.g.*, Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 946 (2013) (proposing an approach to executive branch officers in which the "Senate's failure to act on the nomination within a reasonable period of time, despite good faith efforts of the nominee's supporters to secure a floor vote, shall be construed as providing the Senate's tacit or implied 'Advice and Consent' to the appointment within the meaning of the Appointments Clause.") (footnote omitted). Notably, Stephenson does not argue that this approach is constitutionally required, and many of his pragmatic concerns are explored with reference to a fairly short time horizon. This Essay, conversely, seeks to reason towards a longer-term solution derived from a cognizable a constitutional duty to confirm.

Furthermore, Stephenson does not propose extending this model to the federal judiciary, for two reasons he grounds in pragmatic considerations: first, that "[f]ederal judges, once appointed, cannot be removed (except in extreme circumstances), while executive branch appointments change with the election of a new President (and often before then)," *id.* at 973 (footnote omitted), and second, that "obstructionism seems not to have impeded the overall functioning of the federal courts . . . ." *id.* at 974. Neither of these objections proves insurmountable. First, the recess appointment mechanism advocated by this Essay places an inherent constraint on the potential impact of appointees; it address the pragmatic and constitutional need to have *someone* holding office, while simultaneously mitigating their ability to exercise power indefinitely. Second, given that a duty to confirm is cognizable *at some point*, the mere fact that obstructionism *has not yet* become a problem does not obviate the meaningful question that is at stake here: what to do *if*, or *when*, obstructionism actually does impede the functioning of the judiciary.

30 NLRB v. Noel Canning, 134 S. Ct. 2550, 2561 (2014) (internal citations omitted) (emphasis added).

> *sary for the public service to fill without delay*, the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments . . . .[31]

In the same vein, the Senate's own report cited in *Noel Canning* defines a "recess" as "the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress*."[32] To sit "as a branch of the Congress" is for the Senate to perform the functions and assume the duties that office entails; by mentioning this at all, the Senate report leaves open the possibility that the Senate may persist in a state in which it is not sitting "as a branch of the Congress."[33] Persistent abdication of duty may give rise to this state.

Under the circumstances of severe political extremity this Essay has discussed, it stands to reason that persistent failure by the Senate to perform its constitutionally cognizable duty—above and beyond minor political intransigence, to the point that the functioning of the judiciary is meaningfully *impaired*—ought to be construed as a de facto recess. Thus, when the Senate is functionally "away"—when it is not performing its duties *as a branch of the Congress*—the President's recess appointment power is activated.[34]

B. *A Limiting Principle for the Deadlock-Breaking Recess Appointment Power*

This Essay's central argument—that the constitutional duty to confirm confers on the President a corollary power, in the event of inescapable congressional deadlock, to make temporary appointments under circumstances not traditionally characterized as "recesses"—is inextricably bound up with the need to posit a limiting principle: otherwise, a particularly aggressive

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31 THE FEDERALIST No. 67 (Alexander Hamilton) (second emphasis added).

32 39 CONG. REC. 3820, 3823 (1905).

33 *Id.* (emphasis omitted).

34 The President's authority to make temporary deadlock-breaking recess appointments may also be conceptually justified by reference to the President's mandate to "take Care that the Laws be faithfully executed." U.S. CONST. art. II § 3. Insofar as the President has an obligation to discharge his own duty to make appointments, the Constitution should be read to allow the President sufficient authority to do so in a constitutionally preferable manner.

Treating the clausal structure in this way reflects an interpretive methodology aligning with that advocated by Akhil Amar. Amar argues that constitutional interpretation, done properly, ought to "always focus[ ] on at least two clauses and highlight[ ] the link between them." Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788 (1999); *cf.* Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After* Noel Canning, 64 DUKE L.J. 1513, 1567 (2015) (observing that "the federal courts have to reconcile conflicting constitutional imperatives—the Senate's voice in the appointments process and the President's concomitant duty to oversee the enforcement of federal laws, such that the President is meaningfully responsible and politically accountable for his discharge of these duties.") (footnote omitted).

President might seek to circumvent Congress and the confirmation process as a matter of course. This would clearly be an unconstitutional result; serious caution in the implementation of this broader construction of "recess" is thereby required.

As a starting point for inquiry, it makes sense to tentatively propose that the deadlock-breaking recess appointment power be exercised only where the time period of the Senate's refusal to confirm a nominee has, in total, exceeded the duration of one session of Congress. This extended time window provides ample time for the President to propose multiple nominees, negotiate towards compromise, and revisit these processes in light of potential changes (e.g., off-year elections) in the composition of the Senate. It preserves the virtues of democratic debate and affords the Senate every opportunity to render its "advice and consent," without totally nullifying the President's Article II prerogative to appoint judges or subverting the core constitutional obligation to maintain a viable judiciary.

Limiting the proposed power in this way helps ensure that the deadlock-breaking recess appointment authority cannot be invoked immediately upon the first whiff of congressional reticence to confirm a presidential appointee—an invocation that would seriously compromise the status quo's deliberative dynamic. The existence of this power as a constitutionally authorized option of last resort, however, might well serve as a catalyst towards cooperation.

The obvious disadvantage of this approach is that it risks producing an accelerated rotation of Justices (a string of recess appointments), which leads to both a diminishment of institutional expertise and the potential development of precedential incongruities. The presence of these disadvantages, however, is not a constitutional violation— unlike the crisis scenario sketched above. Indeed, no structural barriers exist in the status quo that would prevent the Supreme Court's current Justices from voluntarily adopting a one- to two-year rotation model, retiring shortly after their appointment to the Court, which would produce a "new normal" of perpetually ongoing confirmation hearings. The mere fact that a swiftly rotating model would be irregular, and possibly suboptimal, does not automatically rise to the level of a constitutional impermissibility.[35] Assuming the worst-

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[35] Drawing upon constitutional history, Steven Pyser has argued for the existence of an "inherent conflict between the Recess Appointments Clause and the importance of lifetime tenure and guaranteed compensation." Steven M. Pyser, *Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent*, 8 U. PA. J. CONST. L. 61, 94 (2006).

Careful attention to the implications and history of the Article III text resolves this dilemma. The language allowing judges to "hold their Offices during good Behaviour," U.S. CONST. art. III § 1, implies that judges' continuance in office ought to occur with an inherently proper regard for one's position in relation to the other dictates of the Constitution. In *Federalist No. 78*, Alexander Hamilton noted that the "good Behaviour" standard was designed to avoid "despotism" and "secure a steady, upright, and impartial administration of the laws." THE FEDERALIST NO. 78 (Alexander Hamilton). A recess-appointed judge evincing "good Behaviour" may thus be understood as a judge who recognizes the ultimate expi-

case scenario—every up-or-down vote results in a failed confirmation, or no hearings or votes are held at all—a deadlock-breaking recess appointment allows for a Court to still *exist* in which the judicial power may be permissibly vested.

CONCLUSION

The solution this Essay proposes, a solution tailored to address the disquieting event of a crisis emerging from persistent failures of the Senate to recognize its constitutional duty to confirm the President's Supreme Court nominees, is assuredly not without its flaws. However, it may well be the *least bad option* under circumstances where the anticipated functioning of government has proven ineffective,[36] and where both constitutional and pragmatic reasons have created a need for decisive executive action. Even under conditions of potential constitutional crisis, the proper separation-of-powers balance ought to be maintained, however. Construing the President's recess appointment power as a deadlock-breaker, in the event of the Senate's abdication of its duty, constructively serves that structural end.

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ration date attached to their temporary presidential commission, and cedes power at the conclusion of that period.

Pyser is by no means the first to intimate that any recess appointments to the federal judiciary are inherently unconstitutional. "No purpose of the recess appointment clause is served by an appointment to the bench. However, each and every case decided by the recess appointee does considerable damage to the Article III right to be heard by a judge free of political domination." William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515, 525 (2004). However, *Noel Canning*'s functionalist analysis repudiates Mayton's claim: the recess appointment power allows for the processes of government to meaningfully continue in the face of unrelenting political deadlock.

[36] While the option this Essay proposes is not unconstitutional, Neil Buchanan and Michael Dorf have also employed the same "least bad option" framing in the context of the exercise of presidential power to choose between potentially unconstitutional options. *See,* Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175 (2012). Buchanan and Dorf propose that when the President is faced with options of dubious constitutionality and no clear way forward, the President ought to follow the example of Abraham Lincoln in employing three decision-making criteria: scope of problem, minimization of unconstitutional assumption of power, and minimization of sub-constitutional harm. *Id.* at 1220; *see e.g.*, Abraham Lincoln, President, Message to Congress in Special Session (July 4, 1861) *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 430-31 (Roy P. Basler ed., 1953).

Extrapolated away from the constitutional/unconstitutional dichotomy, the deadlock-breaking recess appointment solution this Essay proposes conforms to the tripartite standard advanced by Buchanan and Dorf. The scope of the problem (loss of Court functionality) is severe; the power assumed by a broadened recess appointment power is minimized by virtue of the limiting principles (time delay and appointment duration) proposed here; sub-constitutional (i.e., on-the-ground) harms are not meaningfully present. The conception of presidential authority advanced here thus conforms to Abraham Lincoln's "least bad" standard, and should be seriously considered.