Judicial Recess Appointments in the Modern Era:  
Majority Preferences for an Anti Majoritarian Institution  

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Abstract

The purpose of the recess appointment clause is clear – it allows the executive to keep the operations of government running even when the Senate is not in session and unable to confirm presidential appointees. We want to determine why this practice, common several decades ago, virtually disappeared in the 1960s and why it reappeared in the form of three controversial appointments to the Circuit Courts of Appeals—one by outgoing President Clinton in 2000 and two by President Bush in the congressional session preceding his reelection in 2004. We analyze every vacancy on the federal Courts of Appeals in the post-war era, examining the incidence and timing of judicial recess appointments. By focusing solely on modern presidencies we are able to use comparable institutional measures of ideology not available in examinations of executive-legislative interactions in the 18th and 19th centuries. Our model assesses the likelihood of a recess appointment measured in the time it takes to fill a judicial vacancy and our results reveal what factors increase the likelihood of a recess appointment conditional on the vacancy not being filled by the conventional confirmation process. We argue that the decline of judicial recess appointments is the result of both shorter Senate recesses and the prevalence of divided government during the latter half of the twentieth century. Given the prospect of unified government we argue that there is a significant probability that greater use will be made of the recess appointment power for judicial nominees.
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Judicial Recess Appointments in the Modern Era:
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Introduction

For much of U.S. history through the 1960’s, presidents routinely used the recess appointment power under Article II of the Constitution to temporarily seat federal judges. With the exception of William Henry Harrison, in office for one only month, and his successor William Tyler, every president from George Washington to Lyndon Johnson named federal judges through the recess appointment process.¹ Most presidents used recess appointments to the judiciary numerous times, accumulating 304 of such appointments by the first 36 presidents. However, presidents starting with Richard M. Nixon have used the recess power only four times in the subsequent four decades. Presidents Carter and Clinton each made one and President George W. Bush twice used the recess appointment power to seat federal judges.

The authority to make recess appointments comes from Article II Section 2 of the United States Constitution, which gives the Executive the power to “fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”² The purpose of the recess appointment clause is clear – it allows the executive to keep the operations of government running even when the Senate is not in session and unable to confirm presidential appointees.

Why did this practice, common for nearly 200 years, virtually disappear in the 1960s, and why did reappear in the form of one appointment by Bill Clinton and two by

² U.S. CONST. art. II, § 2.
George W. Bush? Many of the efficiency justifications for recess appointments had disappeared long before presidents discontinued the use of the recess appointment power. To answer these questions we analyze every vacancy on the federal Courts of Appeals in the post-war era, examining the incidence and timing of judicial recess appointments. We argue that the decline of judicial recess appointments is the result of both shorter Senate recesses and the prevalence of divided government during the latter half of the twentieth century. Given the prospect of unified government we argue that there is a significant probability that greater use will be made of the recess appointment power for judicial nominees, and the Bush appointments are examples of the use of this power during unified government.

Conventional wisdom holds that a politically weak president, lacking support in the Senate, is more likely to use the recess power to avoid the necessity of Senate approval, but we find to the contrary in the modern era. We conclude that politically strong presidents are more likely to make judicial recess appointments than weaker presidents and that this is particularly the case when the president and Congress have authorized new judicial positions. In a Separation of Powers system the recess appointment power allows a president to move the judiciary ideologically closer to his preferences quickly, but this opportunity carries risks that legislative support can relieve. Thus, a president with a strong ideological and partisan majority carries much less risk.

To demonstrate this we assess the literature and theory of judicial recess appointments. Next we offer a brief review of presidential appointments and power in the modern era. Then we present our data, methodology, and results of our study. Our dataset uses all appellate court judicial vacancies from 1945 through 2006.
By focusing solely on modern presidencies we are able to use comparable institutional measures of ideology not available in examinations of executive-legislative interactions in the 18th and 19th centuries. Our model assesses the likelihood of a recess appointment measured in the time it takes to fill a judicial vacancy. Our results reveal what factors increase the likelihood of a recess appointment conditional on the vacancy not being filled by the conventional confirmation process. Finally, we offer our conclusions and suggestions for future research.

**Judicial Recess Appointments**

From the early days of the republic through the nineteenth century, presidents used the judicial recess appointment power primarily to serve the efficiency of the federal court system. Poor communications, difficult travel conditions and long congressional recesses dictated the need for action by the executive to keep the operations of government going. The framers appeared to accept this need for recess appointments as fundamental and important because there is little evidence of controversy or even discussion of the Recess Appointment Clause at the Constitutional Convention preceding its approval. Events early in the history of the Republic showed the wisdom of the recess clauses. The judiciary for much of the 19th century was severely hampered by shortages and this was especially acute as the size of the nation grew rapidly. Thus, the use of the recess power to fill vacancies was a commonsensical, and largely non-

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controversial, approach to administering government used repeatedly throughout the 18th and 19th centuries.

However, most, if not all of those reasons no longer exist and prior research has shown that in the modern era incidences of judicial recess appointments are governed by different factors than earlier in the history of the presidency. As efficiency justifications declined, so too did the rate of recess appointments. Figure 1 shows recess appointments and Senate recesses from the beginning of the 20th century onward. As one can clearly see the decline in the length of Senate recesses coincides with a substantial decrease in recess appointments, and particularly so in the modern era.

Figure 1 here

The Politics of Modern Appointments

A full-time professional legislature and quick, easy travel undermine the traditional justifications for recess appointments, but they are still observed. Presumably, they serve some purpose other than ensuring the efficient administration of government. The most obvious alternative purpose, of course, is that a president frustrated by the failure of the Senate to approve his judicial nominees then bypasses the Senate via recess appointment. For example, President Clinton appointed Roger Gregory on December 27, 2000, very near the end of Clinton’s second term, to a seat left vacant for more than ten years. Gregory was first nominated in June of 2000, and was the fourth African American nominated by Clinton to the Fourth Circuit. These other nominees failed to achieve confirmation.  

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6 See note 5, supra.
Similarly, George W. Bush nominated both William Pryor and Charles Pickering to the 11th and 5th circuits, respectively, to seats that had gone unfilled for several years. When both nominations stalled in the Senate and it appeared both would fail to get confirmation, Bush relied on the Recess Appointments Clause to place Pickering on the bench in January of 2004 and Pryor one month later. Both came during a short “intrasession” as opposed to the more formal “intersession” recess following the sine die adjournment of the Senate. President Eisenhower made a few of his recess appointments in the fall of 1960, shortly before the presidential election and during his last few months in office.

A president in his fourth or final year, such as Eisenhower, or a president confronting a hostile Senate and a divided government are often regarded as weak presidents. Such presidents are thought to be unable to control a policy or legislative agenda or push preferred policy outcomes. Accounts of these appointments above spin a conventional wisdom that a politically weak president is more likely to use the recess power to avoid the necessity of Senate approval.

We find to the contrary in the modern era, however. With the conventional justifications for unilateral appointment gone, we believe that politically strong presidents are more likely than weaker presidents to make judicial recess appointments. The recess appointment power allows a president to move the judiciary ideologically closer to his preferences, but this opportunity carries risks that political support can relieve. Ideological and partisan compatibility allow the President and his majority party in the Senate to advance partisan and ideological judicial goals. When a President enjoys a
majority in Congress the president can pursue, in part, a two stage strategy – enlarge the federal judiciary and then use the recess power to fill some of the positions.

Several scholars have noted that recess appointments have become the focus of contention and negotiation between presidents and the Senate and played into partisan politics. Following several non-judicial uses of the recess appointment by President Ronald Reagan, including one to the independent Federal Reserve Board of Governors, then-Senate Minority Leader Robert Byrd (D-WV) placed a hold on seventy other pending nominations, “touching virtually every area of the executive branch,” according to the White House, as well as those to federal judicial seats. Reagan’s standoff with Byrd ended with the development of procedures for recess appointments, including notice prior to the beginning of the recess. Of course, the requirement that the Senate be notified that the president intends to appoint an officer during a Senate recess before it begins defies the notion that such appointments are intended to fill vital, unexpected vacancies. Violation of this agreement became one of the controversies surrounding President Clinton’s recess appointment of Roger Gregory. After the Democrats regained control of the Senate in the 1986 election, the new Senate Minority Leader Bob Dole (R-KS), a potential candidate for the presidency, raised the possibility of giving a recess appointment to Robert Bork in response to delay in Bork’s confirmation hearings, a suggestion dismissed by a Senate Democrat as “playing politics”.

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9 See Fisher at 11.
Partisanship also plays a substantial role in judicial expansion. While there is a relationship between population growth and the expansion of the judiciary,\(^\text{11}\) scholars have concluded that partisanship and partisan alignments can both trigger and deter needed growth of federal judicial positions.\(^\text{12}\) Figure 2 illustrates the relationship between caseload, authorization of judgeships and the filling of judicial positions from 1945 through 2007 for the Circuit Courts of Appeals.

Figure 2 here

As the figure shows, caseload increased dramatically and consistently from the mid-1960s to very recently. Judicial positions, however, do not follow a similar pattern. Instead the creation of judgeships follows a jump and plateau pattern and the number of seated circuit court judges follows in kind. The creation and filling of authorized judicial positions are clearly not dependent on population and caseload growth alone. Political factors also influence growth in the federal judiciary.

We illustrate this in Figure 3 by graphing the same authorized and seated circuit judgeship series with the percentage of Senate seats held by the president’s party during the same period.

Figure 3 here

The pattern evident here is consistent with scholarship from recent years. This research finds that the authorization of judicial seats is much more likely under unified government\(^\text{13}\) than under divided government. Increases in the authorization series and

\(^{11}\) See note 7, supra.
\(^{13}\) See de Figueiredo and Tiller at note 14, supra.
the sitting judge series coincide fairly closely with periods in which the president’s party holds more than 50% of the Senate.

There are several reasons to expect these relationships and to interpret them as politically consequential. Presidents and home state senators nominate and approve judges to lower federal court positions, and the nominees overwhelmingly share the party affiliation of the nominating president and senator.\textsuperscript{14} Judicial expansions allow the sitting president to nominate a significant number of judges to lifetime positions and those judges are likely to have the same ideological preferences as the president.

For example, a bill with bipartisan sponsorship introduced in the Senate in 2008 calls for the creation of 50 additions to the Court of Appeals and District Courts (Leahy Senate press release 2008).\textsuperscript{15} Twelve new Courts of Appeals positions would be created along with thirty-eight district court judgeships. Undoubtedly, Senators Hatch and Leahy, both sponsors of the bill, are betting that their preferred presidential candidate will win the election, thereby hoping to fill 50 new judicial positions with 50 conservatives or 50 liberals. A Congress facing a president of the opposing party is far less likely to approve new judicial seats than under unified government. Conversely a unified government will be far more inclined to create new judicial seats in order to achieve some ideological control over federal judicial rulings.

If Congress does create new judicial seats, recess appointments can be particularly appealing to the president. As noted, a recess appointment to an Article III court allows the president to fill a vacancy with a favored candidate quickly, without the obstruction


or rejection the confirmation process might produce. Such appointments are temporary, but an intrasession recess commission can last for nearly two years, if the recess falls early in the congressional session.\textsuperscript{16} This allows the president to appoint an ideologically compatible judge to serve on an Article III court producing rulings that the President favors for a significant period of time. Figure 4 shows the relationship between judicial position creation and judicial recess appointments since Truman.

Figure 4 here

Two spikes in the recess appointment series serve to demonstrate this relationship. When Democrats regained control of the Senate after the 1948 election that also produced the surprising reelection of President Truman, Congress authorized twenty-seven new judicial seats the following year, allowing Truman to set a new record for judicial appointments, recess and otherwise. This surge of activity followed two years of an obstructionist, Republican-controlled Senate Judiciary Committee, who anticipated retaking the White House.\textsuperscript{17} Similarly, after John F. Kennedy assumed the presidency in 1961, Congress authorized the creation of several district and appellate court judgeships.

Completing the association, Figure 5 shows the incidences of recess appointments and the strength of the party of the president in the Senate.

Figure 5 here

Most recess appointments occur during periods when the president enjoys a same-party majority in the Senate. The primary exception, the closely-divided Senate years during Eisenhower’s tenure, followed two decades of uninterrupted Democratic Party control of

\textsuperscript{17} Sheldon Goldman, \textit{Picking Federal Judges: Lower Court Selection from Roosevelt to Reagan} 81 (1997)
the presidency and also produced the most heated controversies over the practice. After
President Eisenhower’s third placement of a Supreme Court justice during a recess, the
Senate passed a resolution (S. Res. 334) opposing the practice. The resolution stated that
recess appointments to the Supreme Court should be used only “under unusual and urgent
circumstances” and the corresponding report from the Judiciary Committee asserted that
such appointments obstructed the Senate’s “solemn constitutional tasks” of providing
advice and consent. Despite the institutional prerogatives asserted, however, the
resolution passed on a primarily partisan vote, 48 to 37.

Politically strong presidents, those with partisan or ideologically compatible
majorities in the Senate, are well-equipped to use the recess power, and it makes sense
that the power should also be used when there are new judicial seats to fill, usually
created by a friendly Congress. In such circumstances, the president is better situated to
weather the controversy and obstructionist tactics of a frustrated minority party or a
Senate upset by intrusions on its institutional power and domain. Conversely, weaker
presidents would have to use such power sparingly and be more aware of intruding on
Senate prerogatives. Thus, a president with a Senate controlled by the opposition, or one
with low approval or one in the fourth year of office, traditional measures of a
constrained presidency, might find it very difficult to justify or contemplate any sort of
strategic use of the judicial recess power.

On its face, a recess appointment to an Article III court allows the president to fill
a vacancy with a favored candidate quickly, without the obstruction or rejection the

19 See Fisher at note 10, supra.
20 See Jeffrey A. Segal, Richard C. Timpone & Robert M. Howard, Buyer Beware? Presidential Influence
confirmation process might produce. As effective as a well-placed recess appointment to the federal judiciary could be, its immediate and long-term costs may outweigh or negate its short-term policy effectiveness. Recent controversies over recess appointments, especially to fill vacancies in the judicial branch, have raised the lack of compelling traditional justification for these appointments such as the unavailability of Congress for extended periods. “When presidents have used temporary or recess appointments … to bypass the confirmation process,” Gerhardt notes, “senators have invariably used their other powers, particularly oversight and appropriations, to put pressure on those choices ….”

Recess appointments share several qualities with the president’s authority to issue executive orders. Many scholars have observed that executive orders tend to proliferate with increases in the president’s legislative strength and success. Not only can legislative support facilitate or increase the value of executive orders, using them as an end run around Congress carries substantial risk. As Cooper notes, “Clinton, Reagan, Carter, Nixon, and Johnson, among recent presidents, encountered significant difficulties… by challenging the legislature using executive orders”. Furthermore, the ability of a president to extend his influence beyond his terms of office by reshaping the federal judiciary through life-term appointments is not served, and may be frustrated, by the injudicious use of unilateral authority like the recess appointment power. All of this leads us to believe that strong presidents and presidents with newly created, vacant

judicial positions are going to be the most likely to use the recess power. In the next section we offer our data, models used and analysis.

**Data, Model and Analysis**

Our interests lie in the likelihood of a specific appellate judicial vacancy being filled by a recess appointment and the political, institutional and temporal factors affecting that likelihood. We restrict our present analysis to the post-war period for several reasons. First, although there had been Circuit Courts and appellate judges previously, the modern U.S. Circuit Courts of Appeals took shape only after the Act of 1891 drafted for that purpose. Also, previous analyses have indicated that the factors influencing use of recess appointments have different effects in the years before the onset of the “modern” presidency and afterward.24 Thus, any conclusions drawn from analyzing vacancies before the modern era may not be generalizable to the subsequent period. Accurate data on vacancies and appointments in the modern era are also considerably more accessible. Ideology scores for the president and the Senate and public approval data on the president’s performance, of which we make use in our analysis, are only available for the modern era.

The term of study for our analysis extends from the beginning of the Truman administration in 1945 to the end of the 109th Congress in the first days of 2007. During this period, 17 judges were appointed by the president during Senate recesses to fill vacancies on the Circuit Courts of Appeals. We make use of the rich and extensive data available in the Multi-User Database on the Attributes of U.S. Appeals Court Judges,

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24 *See* note 8, *supra.*
often referred to as the “Auburn” database.\textsuperscript{25} This database, as updated, provides background information about every judge serving on the courts of appeals from 1801 to 2000.\textsuperscript{26} For our purposes, the data also report characteristics of the seats and vacancies on the Circuit Courts of Appeal. We also coded data on Senate recesses and political control, as well.

Because our term of study is confined to recent decades, we can make use of the Basic Space preference scores that place federal government actors in ideological space comparable across institutions and time.\textsuperscript{27} The standard contemporary method of identifying political actors in the same ideological space, allowing cardinal distance comparisons, is the Basic or Common Space introduced by Poole (1998). We used these scores to place the President and the Senate in ideological space. Thus, changes in the ideological distances between actors across time are reflective of genuine changes in relative ideological positions of these actors.

We also collected data on the collective yearly caseload of the circuit courts from reports of the Administrative Office of the Courts.\textsuperscript{28} Several methods could be used to analyze presidents’ decisions to fill existing judicial vacancies with recess appointees. We could treat each vacancy as an observation to be filled either by the conventional nomination and confirmation process or by recess appointment.\textsuperscript{29} However, this approach neglects the effect that varying circumstances can have on the incidence of recess

\textsuperscript{26} Further updates were performed by the authors.
\textsuperscript{27} See generally, Keith T. Poole, Estimating a Basic Space From a Set of Issue Scales, 42 AM. J. POL. SCI. 954 (1998).
\textsuperscript{29} Pamela Corley, Avoiding Advice and Consent: Recess Appointments and Presidential Power, 36(4) PRESIDENTIAL STUD. Q. 670, 676 (2006).
appointments. Conditions that make recess appointments unlikely at the time a vacancy is created could change as the vacancy persists. Another approach would be to examine the number of recess appointments made in a given year. This approach might serve well for a macro-analysis of the full history of judicial recess appointments, but restricts information that can be included at the micro-level. Limiting our study to the modern era as we do here permits a more nuanced investigation of the qualities of individual vacancies and their effects on incidences of recess appointment.

The Event History Model and variables

The approach we take accounts for both the incidence and timing of recess appointments to court of appeals vacancies. Our data disaggregates judicial vacancies to days vacant so that we can assess the impact of varying conditions on a president’s decision to fill a judicial position during a Senate recess. Using the vacancy-recess day as the unit of analysis produces a very large dataset, but because we know precisely when vacancies are filled, the Senate sessions begin and end, party control of institutions turns over, and other circumstances change, we gain information that would be lost by aggregating to months or weeks.

We estimate an event history model, which considers the timing of events as well as their occurrence. Event history models are often referred to as “duration”, “survival” or “hazard” models, depending on the interest of the researcher. Such models have been used in political science for some time now to study subjects as wide-ranging as policy diffusion, \(^{30}\) government duration, \(^{31}\) democratization, \(^{32}\) and international conflict. \(^{33}\) Event


\(^{31}\) See Gary King et al., A Unified Model of Cabinet Dissolution in Parliamentary Democracies, 34 AM.
history methods have been applied to various questions in judicial politics, including legal change, judicial confirmation, and judicial retirement.

Applications of event history analysis typically model the “hazard rate” of a unit over a period of observation. The hazard rate can be conceived of as the “risk” or likelihood that a given unit experiences an event in a particular interval of time given that the event has not occurred at the beginning of that interval. We are interested in the risk that a judicial vacancy will be filled via recess appointment conditional on the fact that it has not previously been filled by Senate confirmation of a nominee. Event history analysis assumes that during the time intervals being studied, the units are “at risk” of experiencing the event. At the beginning of the increment, a unit must be within the “risk set”—units eligible to experience the event—and when the event can no longer occur, the unit exits the risk set.


33 See D. Scott Bennett & Allan Stam, The Duration of Interstate Wars, 1816 1985, 90 Am. Pol. Sci. Rev. 239, 244 (1996); see also Patrick M. Regan, Third-Party Interventions and the Duration of Intraestate Conflicts Understanding Civil War, 46 J. Conflict Resol. 55, 64 (2002).

34 Sara C. Benesh & Malia Reddick, Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent, 64 J. Pol. 534, 541 (2002); see also James F. Spriggs, II & Thomas G. Hansford, Explaining the Overruling of U.S. Supreme Court Precedent, 63 J. Pol. 1091, 1098 (2001).


38 As described herein, other approaches to studying incidence and duration, such as standard parametric or semiparametric event history models using the entire vacancy period, are unsatisfactory because the event of interest, a recess appointment, cannot possibly happen for much of the time observed. Another alternative, the competing risks model, is also inadequate because at no time is any given vacancy simultaneously at risk of being filled by recess appointment and confirmation. Strictly speaking, the risks do not “compete.” A common approach to estimating competing risks models, assuming independence of
We structure our data in order to study judicial vacancies only when the likelihood of a judicial recess appointment taking place is greater than zero. The risk of a judicial recess appointment when the Senate is in session, for instance, is zero. Individual judicial vacancies also exit the risk set when the vacancy is filled otherwise. Thus, our data consist of every day in which a judicial vacancy existed and the Senate was in recess during our term of study from 1945 to 2007. The resulting dataset consists of 475 judicial vacancies observed over a total of 79,739 vacancy-recess days.

We model variation in the hazard rate from one vacancy-recess day to another as a function of covariates. Factors or conditions that we hypothesize will make recess appointments more likely will cause the hazard rate to increase, while factors or conditions that we expect to deter use of recess appointments will lead to a decline in the hazard rate. The independent variables in the duration model are characteristics of the Senate recesses, the judicial vacancies, and the political-institutional context of a given vacancy-recess day. They can be characterized as a class of fairly constant circumstances or qualities and temporal qualities, or indicators of “political time.”

The first two covariates are qualities of the Senate recesses within which individual vacancy-recess days fall. One measures the length of the recess itself. We also coded a variable that counts the number of days from the vacancy-recess day in question to the end of the next congressional session as a measure of how long a temporary commission issued during the current recess would last. Because the unit of analysis for this model is the recess day, rather than the recess, this covariate decreases by one with

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the events and estimating a separate model for each event, would solve the risk set issue, but would mean estimating a model of confirmation delay (well-studied by other scholars, see, e.g., Binder and Maltzman at note 35, supra) that is outside the focus of this article. Furthermore, the model of recess appointment duration would not condition the event on not observing confirmation.
every subsequent day within a Senate recess. The first of these variables is a comparatively constant quality, while the second measures a particular, institutionally relevant, consistently changing understanding of time.

The next group of covariates reflects features of the judicial vacancies, the actual units of our analysis. We code an indicator that distinguishes judicial vacancies newly created by legislation from those that result from a judge vacating a previously existing seat. Another variable counts the length of the number of recess days elapsed since the vacancy occurred. This “spell” variable serves to capture a form of “duration dependence,” indicating how much time the Senate has spent in recess while the vacancy goes unfilled. Another form of time dependence is reflected in the next variable, which measures the number of days for each observation until Senate confirmation. For vacancies that are not filled by recess appointment, this is the number of days remaining until the vacancy is filled, but for seats filled by recess appointment, this quantity is the number of days until the vacancy is filled added to the number of days from the recess appointment to the day a nominee is confirmed permanently to the seat. The difference between the two measures the gain in days a recess appointee would be active on the bench over the conventional confirmation process. The first of these variables, the new seat indicator, is constant across a vacancy spell, while the other two are, of course, time-varying.

The remaining variables capture political and institutional circumstances that are qualities of neither the Senate recesses or of the specific vacancies that constitute our data, including rates the president’s assertiveness and political strength. The first of these is a measure of the executive activity of the president in office at the time. To measure
this we use the number of executive orders issued by the president during the current term. Although this quantity will change slowly, a number of vacancies span more than one presidential term, even across different presidencies. We also include a measure of the public’s approval of the president’s performance in office, produced from the Gallup survey data made available by the Roper Center and transformed into a monthly series using the dyad ratios algorithm developed by James Stimson. This algorithm produces a measure of the covariance of different series of data from survey marginals, recursively averaging ratios of different series of survey responses as indicators of the same underlying concept and placing the aggregate measures on a common metric.

Three more variables are included to capture conditions not specific to the vacancy or the recess. We coded a variable measuring the absolute distance between the Common Space ideology scores of the current president and the median of the Senate. This variable reflects the policy division between the president and Senate with more accuracy than the proportion of Senators of the president’s party, given the heterogeneity of American political parties and especially the divisions over judicial nominations within parties that have been prominent in decades past. A yearly circuit caseload variable, the number of appeals filed per year as reported by the Administrative Office of the Courts, is also included. This measures the absolute demand for judicial services and should reflect the president’s interest in promoting the efficiency of government. Finally, the event history model has a time counter indicating the number of days from the beginning of our period of observation, roughly the beginning of the Truman administration. This variable measures the passage of time, rather than the duration of a

spell or time until some point. Thus, it will capture any secular trend in the incidence of recess appointments over the course of the six decades of our study.

**The Split Population Model**

A complication of the event history approach is that standard models of this type assume that all observations in the dataset will eventually experience the event, even if the period of study does not last long enough to observe it. For our purposes, this means that every vacancy will eventually be filled by a recess appointment were we to observe it long enough. Obviously, this is an unreasonable assumption. In fact, the duration of a judicial vacancy is a result of two processes, the conventional confirmation process and the president’s choice to fill the seat via recess appointment. Either of these processes can end the vacancy. Failure to take into account the fact that most vacancies are not filled by recess appointment can introduce heterogeneity into the model and lead to incorrect estimates of the influence of the covariates on the phenomenon.

One way to address this problem is to model the observed duration as a result of two separate processes, the recess-appointment choice and the exit of spells from the risk set by Senate confirmation. As constituted, the first process is the duration in days that the vacancy persists and the Senate is in recess until a recess appointment occurs, or does not. While the vacancy is potentially eligible to be filled by recess appointment on those days, it is not simultaneously at risk of being filled by confirmation. Rather, confirmation ends the spell, but occurs during the “gap time” between recesses. Our solution is to model the observed duration to recess appointments conditional on the probability that the vacancy does not exit the risk set—is not filled—by confirmation before that day.
The “split-population” or “cure” model relaxes the assumption that all observations will eventually observe the event. The set of observations are a combination of two “populations”: those that eventually experience the event and those which do not. These observations are referred to as “cured,” reflecting the root of models such as this in biostatistics. The split-population model mixes the unconditional density of the hazard function with the probability that the unit is among the observations that will experience the event. This probability is typically estimated as a function of covariates using a standard dichotomous dependent variable model such as logit or probit.

Following this estimation strategy, we specify a split population duration model with the duration equation specified as above and a probit model predicting the likelihood that the vacancy will be filled by Senate confirmation without a recess appointment. The variables in this equation are a variable indicating whether a particular recess occurs in an “intrasession,” as opposed to an “intersession,” recess, the overall length of the vacancy in days, indicators of whether the vacancy occurs during a presidential election year and whether the vacancy occurs during divided party control of the Senate and president, and the caseload variable. Descriptive statistics for our data are presented in Table 1.

Table 1 here

Analysis: The results of the split-population event history model are reported in Table 2. The fully specified model improves the log-likelihood substantially over the null, which results in a significant likelihood-ratio test and indicates a very good fit to the data. Considering the event history model first, we find many of our covariates to have statistically significant effects on the hazard rate. Moreover, our results indicate that presidents do use the power to appoint judges unilaterally in a strategic fashion, but not in
the institutionally strategic fashion of conventional wisdom, pitting the president against the Senate. Politically strong presidents ideologically close to the Senate and who have newly created judicial vacancies to fill are more likely to use the recess appointment power, and they use it when they can get the greatest benefit from the appointment. The probit model of “cured” observations reveals that vacancies are more commonly filled by recess appointment before confirmation during intra-session recesses, during presidential election years, when the presidency and the Senate are held by the same party, and in response to rising caseload.

For interpretive purposes, positive coefficients reflect increases in the hazard rate, or a greater likelihood of observing a recess appointment, while negative coefficients indicate decreasing likelihood. Marginal effects for event history analysis are instantaneous changes in the hazard rate; Marginal effects for the cure analysis are average effects on the probability of observing a recess appointment.

Table 2 here

Many of our hypotheses are confirmed by the results. Recess appointments in the modern era have their own logic and consistency and have little in common with the efficiency rationales of earlier times. Contrary to conventional wisdom strong presidents with Senate majorities used new judicial seats and short intrasession breaks to recess appoint judges. Despite the compelling graphical evidence in Figure 1, the length of Senate recesses does not have a statistically significant effect on the timing of recess appointments. The effect is positive, as expected, but not distinguishable from zero. Instead, we find that the length of time a recess commission would last is directly related to the likelihood of a recess appointment. Because appointments made during intrasession
recesses typically last longer than those made between sessions, this implies that modern incidents of recess appointments to the courts depart from the tradition disfavoring such appointments. It also suggests that presidents value the amount of time a temporary commission would last, either to allow a longer opportunity to win approval for the nominee or to benefit from a longer term of service from the unilaterally appointed judge.

Perhaps the most interesting finding is the indicator variable for seats newly created by Congress. The covariate is positive and significant and its marginal effect is quite large. Simply put, recess appoints are more likely when newly created judicial positions emerge. Congressional authorization of new seats in the judiciary, as found in previous scholarship, typically occurs when government is unified. This tells a different story than the conventional account of recess appointments used by presidents facing hostile legislatures. An implication of this relationship is that for much of the modern era, judicial recess appointments have been a collaborative endeavor between a legislative majority and the president, rather than the conflictual one typically assumed.

The variable that counts the number of recess-vacancy days elapsed is positive and significant, indicating positive duration dependence. The more days the Senate spends in recess without acting on whatever nomination may be pending for a judicial vacancy, the greater the likelihood that the president will act to fill the vacancy unilaterally. Similarly, the difference in days between the confirmation date filling a vacancy permanently and the current day is positively related to recess appointments. Taking this quantity as an indication of the president’s expectations of delay, this suggests that presidents are responsive to perceived gridlock. However, this gridlock is more likely the result of minority obstruction than of majority opposition.
Several of our results illustrate the complicated relationship between the president and the Senate with regard to recess appointments. For example, the number of executive orders issued by a president is negatively correlated with the changes in the recess appointment hazard rate. Presidents have to make decisions about their use of unilateral executive authority, since the use of such authority can have consequences in Congress. Judged by its marginal effect, this variable has a pronounced impact on the hazard, decreasing the hazard rate to 5% of its baseline value for every increase of 1,000 executive orders. Thus, presidents make choices between using executive orders and making judicial recess appointments. In recent decades, we suggest that presidents have chosen the “lawmaking” authority of executive orders over recess appointments.

We also discover that the ideological distance of the president from the Senate median, a measure of the president’s policy alignment with the chamber, is negatively related to a recess appointment. The greater the ideological distance between the president and the senate, the less likely the president is to use the recess power. This finding also shows that in the modern era Senate party strength is positively related to recess appointments. Thus, contrary to the conventional wisdom that recess appointments are a tool primarily used by presidents without political support in the Senate, presidents are more likely to use recess appointments to fill judicial seats when they are politically aligned with the Senate. Minority obstruction and delay, rather than majority opposition, appears to be the impediment presidents are overcoming when they bypass the Senate confirmation process. Adding another dimension to this conclusion, we learn that presidential approval ratings of the public are negatively related to incidents of judicial
recess appointment. Lastly, the secular time counter is negative, capturing the easily observable decline in recess appointments to the courts over our period of observation.

Turning our attention to the “cure” equation in the model, we observe that all of the variables in the specification are significant and in anticipated directions. It bears repeating that in this equation, positive coefficients indicate a direct relationship with the likelihood of the vacancy being filled by Senate confirmation, rather than recess appointment. First, we find that intrasession recesses produce a greater likelihood of a recess appointment in the post-war era. This is in direct contrast to the widely held principle that appointments during the typically brief recesses taken within sessions of the Senate are disfavored and should be rare. One likely cause of this relationship is that the lengthy intersession recesses observed in previous periods have been replaced with numerous intrasession recesses in the contemporary Congress. Strategically, however, intrasession recess appointments make sense and this relationship should not be surprising. Temporary commissions issued during intrasession recesses expire later than those made after the sine die adjournment of the Senate. Intrasession recess appointments made shortly after the beginning of a session can last nearly two years, giving the appointee considerable time on the bench to conduct work and receive confirmation by the full Senate.

The length of a vacancy is positively related to vacancies experiencing the “cure” of Senate confirmation. At least in the modern era, it appears, protracted vacancies are generally resolved not by unilateral action, but by eventual Senate action, despite recent high-profile counterexamples. A possible cause of this relationship is that the president fills some vacancies with recess appointments in which considerable delay is expected, as
concluded from the event history analysis. Again, we find that divided government makes a recess appointment prior to confirmation *more*, rather than less likely.

Bearing out conventional wisdom, the Senate is significantly less likely to fill vacancies during presidential election years than otherwise. Finally, we find that caseload significantly decreases the likelihood of a seat being filled by Senate confirmation. Caseload was positively related to recess appointment in the duration equation, but not significant. From this we might infer that as Hamilton suggested in the Federalist Papers, the executive is more concerned with the efficiency of government than is the legislature.

**Conclusions**

Our analysis finds support for our assertion that judicial recess appointments have declined in the modern era because of divided government and politically weaker presidents in addition to shorter senate recesses. Presidents who are ideologically closer to the Senate are more likely to use the recess appointment power than an ideologically distant president. Stronger presidents are more likely to enjoy the creation of new judicial positions during their terms and this in turn leads to the use of the recess power to fill some of these seats. Our results suggest that contemporary use of the recess appointment power to fill federal judicial seats should be greeted with some skepticism, but for different reasons than are often cited by critics. Modern presidents make recess appointments in an opportunistic fashion, but in collaboration with a politically-aligned Congress, rather than against a resistant legislative majority. It leads us to suggest that when resolutions are introduced to increase the size of the judiciary, however pressing the need, from a purely partisan and ideological viewpoint the opposition party is justified in viewing such legislation skeptically. Growth in the judiciary also means a greater
likelihood of judicial recess appointment. That is especially so given the powerful
position the president is likely to be in if such legislation passes Congress.

The story told by our analysis calls judicial recess appointments into question, but
we do not believe that the Senate is the party abused the most by their use. In most cases,
it appears that presidents are careful to avoid provoking the Senate too much with
unilateral appointments to the courts. Rather, the president and Congress use recess
appointments to shift the ideologies of the courts more quickly than could be achieved
through the conventional political process. The high drama in the Senate precipitating
from President Bush’s recent temporary appointments to the circuits focused on the use
of filibusters by the minority Democrats to delay the president’s appointments and the
threat by the Senate majority to extinguish minority rights in the chamber. Recess
appointments, bypassing minority objections and setting a status quo that could
contribute to overcoming that obstruction can be seen as another means by which
minority rights in the Senate are diminished. The ultimate object of judicial recess
appointments, therefore, is to achieve change in the policy preferences of the federal
courts that could not be achieved otherwise.
Table 1: Descriptive Statistics

<table>
<thead>
<tr>
<th>Variable</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intra-Session Recess</td>
<td>.659</td>
<td>.338</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Judge-Days Gained by Recess Appointment</td>
<td>19.348</td>
<td>135.722</td>
<td>0</td>
<td>1377</td>
</tr>
<tr>
<td>New Seat</td>
<td>.217</td>
<td>.421</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Length of Recess (days)</td>
<td>41.354</td>
<td>34.486</td>
<td>1</td>
<td>181</td>
</tr>
<tr>
<td>Recess-Vacancy Counter (days)</td>
<td>219.428</td>
<td>251.303</td>
<td>1</td>
<td>1630</td>
</tr>
<tr>
<td>Appointment Length (days)</td>
<td>232.959</td>
<td>131.040</td>
<td>0</td>
<td>694</td>
</tr>
<tr>
<td>Caseload</td>
<td>40,170.44</td>
<td>18,093.33</td>
<td>2,615</td>
<td>68,473</td>
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<tr>
<td>Presidential Approval</td>
<td>55.161</td>
<td>11.047</td>
<td>24.373</td>
<td>85.739</td>
</tr>
<tr>
<td>Executive Orders (thousands)</td>
<td>2.0483</td>
<td>.563</td>
<td>.990</td>
<td>5.040</td>
</tr>
<tr>
<td>Ideological Distance of President from Senate Median</td>
<td>.479</td>
<td>.134</td>
<td>.121</td>
<td>.677</td>
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<tr>
<td>Secular Time Counter (days)</td>
<td>15,979.22</td>
<td>4,722.12</td>
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<td>22,406</td>
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<tr>
<td>Length of Vacancy (days)</td>
<td>1,008.616</td>
<td>848.560</td>
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<td>3,692</td>
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<tr>
<td>Presidential Election Year</td>
<td>.272</td>
<td>.445</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Divided President-Senate</td>
<td>.518</td>
<td>.500</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

N = 79,739
### Table 2: Split-Population Model of Days to Recess Appointment

<table>
<thead>
<tr>
<th>Event History Analysis (EHA) Variables</th>
<th>Time to Recess Appointment</th>
<th>Coefficient (SE)</th>
<th>Z-score</th>
<th>Marginal Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Length of Recess (days)</td>
<td></td>
<td>0.000237 (0.000796)</td>
<td>0.30</td>
<td></td>
</tr>
<tr>
<td>Appointment Length (days)</td>
<td></td>
<td>0.0210*** (0.00308)</td>
<td>6.81</td>
<td>1.021</td>
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<tr>
<td>New Seat</td>
<td></td>
<td>1.580* (0.696)</td>
<td>2.27</td>
<td>4.855</td>
</tr>
<tr>
<td>Recess-Vacancy Counter (days)</td>
<td></td>
<td>0.0106*** (0.00240)</td>
<td>4.43</td>
<td>1.011</td>
</tr>
<tr>
<td>Judge-Days Gained by Recess Appointment</td>
<td></td>
<td>0.00753*** (0.000977)</td>
<td>7.71</td>
<td>1.008</td>
</tr>
<tr>
<td>Executive Orders (thousands)</td>
<td></td>
<td>-3.060*** (0.522)</td>
<td>-5.86</td>
<td>0.0469</td>
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<tr>
<td>Ideological Distance of President from Senate Median</td>
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<td>-6.629*** (2.205)</td>
<td>-3.01</td>
<td>0.00132</td>
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<tr>
<td>Presidential Approval</td>
<td></td>
<td>-0.0713** (0.0187)</td>
<td>-3.81</td>
<td>0.931</td>
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<tr>
<td>Caseload</td>
<td></td>
<td>0.0003** (0.000108)</td>
<td>2.78</td>
<td>1.0003</td>
</tr>
<tr>
<td>Secular Time Counter (days)</td>
<td></td>
<td>-0.00208*** (0.00031)</td>
<td>-6.72</td>
<td>0.998</td>
</tr>
<tr>
<td>Constant</td>
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<td>-10.787</td>
<td>2.766</td>
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</table>

<table>
<thead>
<tr>
<th>“Cure” Analysis Variables</th>
<th>Confirmation Prior to Recess Appointment</th>
<th>Coefficient (SE)</th>
<th>Z-score</th>
<th>Marginal Effect</th>
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</thead>
<tbody>
<tr>
<td>Intra-Session Recess</td>
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<td>-5.292*** (1.093)</td>
<td>-4.32</td>
<td>0.101</td>
</tr>
<tr>
<td>Length of Vacancy (days)</td>
<td></td>
<td>0.0135** (0.00466)</td>
<td>2.91</td>
<td>-0.000240</td>
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<tr>
<td>Divided President-Senate</td>
<td></td>
<td>4.110*** (0.545)</td>
<td>7.54</td>
<td>-0.0145</td>
</tr>
<tr>
<td>Presidential Election Year</td>
<td></td>
<td>5.505** (1.728)</td>
<td>3.19</td>
<td>-0.0108</td>
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<tr>
<td>Caseload</td>
<td></td>
<td>-0.00109** (0.000354)</td>
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<tr>
<td>Constant</td>
<td></td>
<td>0.922</td>
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</table>

<table>
<thead>
<tr>
<th>Log-Likelihood (Null = -137.451)</th>
<th>LR Test (21): 253.61</th>
<th>p &gt; χ² = .000</th>
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</thead>
<tbody>
<tr>
<td>-33.945</td>
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<td></td>
</tr>
</tbody>
</table>

* p < .05, ** p < .01, *** p < .001. Two-tailed tests; SEs are heteroskedasticity-robust.

N = 475 Vacancies; 79,739 Vacancy-Days

Marginal Effects for EHA model are instantaneous changes in the hazard rate; Marginal Effects for the cure analysis are average effects on the probability of not observing a recess appointment (probability of the observation being “cured” or exiting the risk set without a recess appointment.)
Figure 1: Average Length of Senate Recesses and Judicial Recess Appointments
Figure 2: Judges and Caseload in the Federal Circuits
Figure 3: Judges and Strength of the President's Party in the Senate

- **Authorized Circuit Judges**
- **Sitting Circuit Judges**
- **President's Party Strength**
Figure 4: Authorized Article III Judgeships and Judicial Recess Appointments
Figure 5: Recess Appointments and President's Party Strength in the Senate

![Graph showing Recess Appointments and President's Party Strength in the Senate.](image)