subject to certain exceptions, may receive no salary until he has been confirmed by the Senate.[637] This and other provisions governing recess appointments are designed to protect the Senate's advice and consent function by confining the recess appointment power of the President. By targeting the compensation of appointees as opposed to the President's recess appointment power itself, these limitations act as indirect controls on recess appointments, and their constitutionality has not been adjudicated. A federal district court noted that "if any and all restrictions on the President's recess appointment power, however limited, are prohibited by the Constitution, 5 U.S.C. § 5503 . . . might . . . be invalid."[638] Additional constitutional concerns might arise from the application of these provisions to judicial recess appointees.[639]

Judicial Appointments

Federal judges clearly fall within the terms of the Recess Appointments Clause. But, unlike with other offices, a problem exists. Article III judges are appointed "during good behavior," subject only to removal through impeachment. A judge, however, who is given a recess appointment may be "removed" by the Senate's failure to advise and consent to his appointment; moreover, on the bench, prior to Senate confirmation, he or she may be subject to influence not felt by other judges. Nonetheless, a constitutional attack upon the status of a federal district judge, given a recess appointment and then withdrawn as a nominee, was rejected by a federal court.[640]

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[637] 5 U.S.C. § 5503. The provision has been on the books in some form since 12 Stat. 646 (1863).

[638] Staebler v. Carter, 464 F. Supp. 585, 596 n.24 (D.D.C. 1979).

[639] *See* Evans v. Stephens, 387 F.3d 1220, 1224 n.6 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005) ("To our knowledge, Congress has never attempted to diminish the pay of a recess-appointed judge while he was in office. Whether such an attempt would be constitutional is itself an open question.").

[640] United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986). The opinions in the court of appeals provide a wealth of data on the historical practice of giving recess appointments to judges, including the developments in the Eisenhower Administration, when three Justices, Warren, Brennan, and Stewart, were so appointed and later confirmed after participation on the Court. The Senate in 1960 adopted a "sense of the Senate" resolution suggesting that the practice was not a good idea. 106 CONG. REC. 18130–18145 (1960). Other cases holding that the President's power under the Recess Appointments Clause extends to filling judicial vacancies in Article III courts include United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963), and Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005). In the latter case, however, Justice Stevens, although concurring in the denial of the petition of certiorari, wrote that "it would be a mistake to assume that our disposition of this petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as vacancies on this Court, with appointments made absent consent of the Senate during short intrasession 'recesses.'" 544 U.S. at 943.