2003

Recess Appointments and an Independent Judiciary

William Ty Mayton

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Presidents Clinton and Bush have revived a quiescent executive power, that of recess appointments to the bench. In the last few days of his presidency Mr. Clinton made one such appointment. Following suit, Mr. Bush has now made two. All three appointments were of presidential nominees for whom Senate confirmation, either up or down, had been forestalled by parliamentary moves. For both Presidents the attractive feature of a recess appointment was that it placed their nominees on the bench without Senate confirmation. But because of this by-pass these appointments have been questioned, on political and constitutional grounds. This article is about the constitutional part of the debate. The constitutional issues examined are: first, whether present use of the recess appointments clause is so expansive as to exceed the power in fact granted by the clause, thereby infringing the senatorial prerogative of "advice and consent," and second, whether recess appointments to the bench infringe the personal right, as derived from Article III of the Constitution, to federal courts presided over by judges "free of political domination." This second issue, respecting the right to judges free of political domination, shows that recess appointments to the bench are a special case.

Considering that these issues of power and right interact so complexly, an overview seems useful, which view best starts by identifying the recess appointments clause and its purpose. The clause provides, "The President shall have 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."[1] The purpose underlying this power is evident. In 1789 and for ten sessions thereafter, intersession recesses of Congress

* Simmons Professor of Law, Emory University School of Law. I thank Seth Cohen, 2L Emory, for his assistance and research.

1. U.S. CONST. art. II, § 2, cl. 3.

averaged seven months in length.[2] During these several months important public offices might go vacant. In anticipation of these inopportune vacancies, the framers modified the standard of Senate confirmation to allow for temporary presidential appointments to fill them as needed. Today, however, recesses of the Senate are not seven months but four to five weeks. In this short time, a new session is just around the corner and in any event modern communications and transportation allow for special sessions of the Senate wherein crucial offices might be filled. Therefore, the urgency toward which the recess clause was directed is not today a factor. This is especially so respecting the bench, where other judges—by inter- and intracircuit transfers—can cover a vacated post.

In any event, the clause today often serves a purpose quite different from that of ensuring that the public service does not suffer due to a vacancy in office left unfilled while the Senate is dispersed and unavailable during its recess. Presently the clause is used to create a place-holder in office who may thereby gain a prescriptive advantage respecting that office. This possibility was in fact noticed early on, by Senator John Quincy Adams, Jr., as he wrote his father of a certain tactical advantage open to the President. "Provisional appointments," he wrote, might be made during a recess of the Senate, so that "when the Senate meet, the candidates proposed to their consideration are already in possession of the office to which they are to be appointed."[3] In this sense, Mr. Clinton may have made a politically astute move (as the *New York Times* put it)[4] in his recess appointment of Judge Gregory. By it he put in place, ahead of the incoming Bush administration, his own candidate. Somewhat similarly, the appointments by President Bush, of Judges Pickering and Pryor, may defuse the filibusters that keep these appointments from being voted on. These are the political possibilities of the clause. Safe to say, though, recess appointments for these reasons are not what the clause is about.

The second part of this overview is about whether the present use of the recess appointments clause exceeds the terms of the clause. These terms are that the President may fill vacancies that "happen during the Recess of the Senate." Vacancies that

2. U.S. Govt. Printing Office, 1993-94 Official Directory, 103d Cong. 580 (1993).

3. JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 265 (1968).

4. "White House officials and other democrats said they thought Mr. Clinton's action was particularly astute because it could put the Republicans on the defensive. . . ." N.Y. TIMES, Dec. 28, 2000, at www.nyt.com/12/2000-28/politics.

happen not during but before a recess—when the Senate is in session and available for confirmation—do not generally create the same urgency as vacancies that "happen during the recess of the Senate." However, recess appointments as they are made today—as in the case of Clinton and Bush's appointments to the bench—are usually for vacancies that *did not happen* while the Senate was in recess. Rather, the vacancy happens at some other time and then, usually after the Senate fails to fill the post by not acting on the President's nominee, the President places a nominee on the bench without that appointment and by a recess appointment. The scope of power issue raised by this practice is, of course, that the President has exceeded the power in fact provided by the text of the clause. However, in *United States v. Allocco*, which case is (improperly) viewed as the single, controlling authority here, the Ninth Circuit found that the plain terms of the clause had been modified by a certain "gloss of history."[5] While *Allocco* is itself weak on this point, the possibility remains that the terms of Article II have been levered out of their plain meaning by a concession on the part of Congress, a 1940 amendment to the Tenure of Office Act. But along with noting this possibility of concession, it is also correct to note that such claims of concession are disfavored. As explained by the Supreme Court, the appointment provisions of Article II "preserves ... the Constitution's structural integrity by preventing the diffusion of the appointment power":

> Neither Congress nor the Executive can agree to waive this structural protection.... The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.[6]

This overview's third part is about rights derived from Article III of the Constitution. In this respect, assume that the President does indeed have the power to make a recess appointment, but consider the possibility of a check to that power by an assertion of right. There are two such rights. One is what case law speaks of as a public right, which is our collective interest in "the role of the independent judiciary within the constitutional

5. United States v. Allocco, 305 F.2d 704 (2d Cir., 1962), discussed in text at *infra* notes 114-119.

6. Freytag v. Commissioner, 501 U.S. 868, 880 (1991). In *Freytag*, the claim was that the courts should "defer to the Executive Branch's decision that there has been no legislative encroachment on Presidential prerogatives under the Appointments Clause." *Id.* at 878. The Court rejected that claim for the reasons stated above.

scheme of tripartite government."[7] The "role" thus protected is the better capacity of a politically independent court to sustain the checks and balances feature of "tripartite government." I do not wish to understate this "public right" nor imply that it is not relevant to the case of recess appointments to the bench. After all, in reference to the structural guarantee this right embodies, the Supreme Court, in *Nguyen v. United States*,[8] recently vacated a federal court of appeals decision because the panel that rendered it included a judge who did not have the lifetime tenure that Article III requires. Nonetheless, Article III includes a different sort of right that is more pressing. This right is the "personal right" to "have claims decided before judges who are free from potential domination by other branches of government."[9] This right is in play in each and every case heard by a recess appointee, and is always highly visible, always so rightly owed, and always so clearly breached.

When a recess appointee hears a case, whether he or she gains a permanent appointment to the bench is yet to be determined; whether the appointee gains tenure is contingent upon renomination by the President and confirmation by the Senate. The recess appointee, then, is not freed from political pressure and therefore acts in the face of the personal right—as can be claimed by any party whose claim the appointee hears—to be heard by a politically independent judge. The startling prospect of an assertion of this right is that whether reached singly by a district court judge or jointly by an appellate panel, each and every judgment that includes a recess appointee stands to be overturned.

In recess appointments, the right to a judge freed of political domination first came before the courts in *Ex Parte Ward*.[10] In this 1899 decision the right was asserted but the Supreme Court would not hear it owing to now defunct jurisdictional grounds. Eighty-five years later in 1984, the right was heard and decided by the Ninth Circuit in *United States v. Woodley*.[11] In defendant's

7. Commodity Future Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986). The courts also refer to this feature of the political autonomy required of judges by Article III as the "structural principle." *Id.* at 850.

8. 123 S. Ct. 2130 (2003).

9. *Schor*, 478 U.S. at, 848; Northern Pipeline Const. Co, v. Marathon Pipe Line, 458 U.S. 50, 58 (1982).

10. 173 U.S. 452 (1899).

11. United States v. Woodley, 726 F.2d 1328, 1330 (9th Cir. 1983), *rev'd en banc*, 751 F.2d 1008 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986). United States v. Allocco, 305 F.2d 704 (2d Cir., 1962), is often referred to in relation to the right to a judge free of

appeal from her conviction in a criminal case, the court on its own motion overturned the judgment against her because it had been rendered by a recess appointee, holding that because "[h]e lacks the essential attributes of an Article III judge, a recess appointee to the federal bench cannot exercise the judicial power of the United States."[12] However, on rehearing *en banc*, the circuit in a split decision reversed this initial decision and reinstated the defendant's conviction.

In a notable dissent to the *en banc* opinion, Judge Norris would have resolved the conflict between the recess appointments clause and Article III according to the canon that "[constitutional] principles" must be considered as "of equal dignity, and . . . must [not] be so enforced as to nullify or substantially impair another."[13] Judge Norris explained that no significant impairment of the recess appointment is caused by excluding judges from its scope. Among other things, inter- and intracircuit transfers of judges, as provided by Title 28, alleviate immediate and acute problems caused by a vacancy on the bench.[14] In contrast, the independence of the judiciary is substantially impaired whenever a judge's work is subject to political review. A recess appointee's work is subject to such review and no human being can be oblivious of that. In these comparative terms, resolution of the conflict between the recess appointments clause and Article III was clear and certain: the Article III standard of a politically independent judiciary clearly prevailed.[15]

However, a majority of the Ninth Circuit judges chose a method different than the "resolution according to purposes" method used by dissent and this different method produced a different result. The majority instead looked to history, according to Justice Frankfurter's dictum that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution . . . may be treated as a gloss on 'executive Power' vested in the President."[16] Doing so,

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political domination. This case, though, was instead largely concerned with the scope of the President's power, with whether the vacancy filled by a recess appointment must have been created "during the recess" in which the appointment was made.

12. 726 F.2d at 1339.

13. Dick v. United States, 208 U.S. 340, 353 (1908). As expressed by Judge Norris, "the resolution of conflict between two provisions of the Constitution requires an evaluation and balancing of underlying values." 751 F.2d at 1022.

14. 751 F.2d at 1024.

15. *See id.* at 1022-24.

16. Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter,

the majority found that a long history of recess appointments to the bench had established a practice of recess appointees hearing cases, which practice amounted to the requisite gloss of history. However, the history, historiography really, used by those judges was off target, both in *content* and in *technique*. I say this knowing that in 1795 George Washington made a recess appointment, of John Rutledge, to the Supreme Court and that about 160 years later President Eisenhower placed three Justices—Earl Warren, William Brennan, and Potter Stewart—on the Court by that same route.

The problem with the history used in the *Woodley* case is that actually it was not focused on the issue in the case. This issue was not the mere fact of recess appointment but the fact the appointee had gone ahead and heard cases prior to Senate confirmation and while he was yet in that political limbo. At first glance, this distinction between the fact of appointment and the appointee in fact hearing cases may seem odd but, then, consider this: Of the twelve recess-appointments to the Court prior to the Eisenhower appointees, only two had heard cases prior to their confirmation. Justice Rutledge did so and then Justice Benjamin Curtis in 1851, for a total of four cases between them. Following Curtis and for the next one hundred years, no recess appointee heard cases prior to his Senate confirmation.

For instance, John Harlan received a recess appointment to the Supreme Court on March 29, 1877. The Senate confirmed that appointment on November 29 of that year. Thereafter, he took the oath of office on December 10. The *U.S. Reports* for that year contain a "Memorandum" setting forth this information and additionally stating that Mr. Harlan "took no part in the decision of the cases reported in this volume preceding *United States* v. *Fox*."[17] That case was both argued and decided after Justice Harlan was confirmed by the Senate and then sworn in. In at least the century preceding the Eisenhower appointments to the Supreme Court, the practice, then, was that Supreme Court appointees did not hear cases prior to confirmation and the fact that they did not was in succeeding years noted in the Senate, there described as a "fine practice" and the better part of judicial ethics.[18]

J., concurring).

17. *Preface* to 97 U.S. REP. (1877). Some sources list Oct. 15, 1877 as the date of Harlan's recess appointment. The October date, though, is when President Hayes nominated him for a permanent seat on the Court.

18. 81 CONG. REC. 7993 (1937). *See also infra* notes 71-72.

The unsettling part about the Eisenhower appointees, then, was that they decided cases before they, the appointees, were sheltered by the political independence that confirmation provides. For this reason notable scholars such as Henry Hart and Paul Freund objected to those appointments.[19] In the wake of these objections the Senate held hearings, the result of which was a resolution saying that the President ought not to make recess appointments to the bench.[20] As shown by this sampling of history, the historiography deployed in *Woodley,* because of its lack of focus, is not as neat as it might seem.

All things considered, the variance between the recess appointments clause and Article III seems best ironed either by reconciling underlying purposes, as done by the dissent in *United States v. Woodley* or better yet, as I shall explain, by a text-based and rights-oriented solution to the problem. In any event, *history should not here be the guide*. But if history is taken as the guide, the question may remain a close one. It may be close not because of appointments to the Supreme Court, here there is too little history and too much opposition in the history there is. Rather, the question may be close because of a history of which little if anything has been known or reported, this history being that of recess appointments not to the Supreme Court but to the lower courts. This history is reported below. And as it must given the current reliance on history in these matters, much of this article is, regrettably, about identifying and untangling the history used to support recess appointments to the bench.

I. THE PURPOSES OF THE RECESS APPOINTMENTS CLAUSE AND THE TERMS, RIGHTS, AND PURPOSES OF ARTICLE III

On September 7, 1787, the constitutional convention in Philadelphia was about a week shy of completing its work. That Friday, a tired group of delegates finally settled a longstanding question about selecting high federal officers. The decision was that the appointment of these officers would be shared by the President and the Senate. Governeur Morris explained, "as the President was to nominate, there would be responsibility, and as

19. HARVARD LAW SCHOOL RECORD at 1 (Oct. 8, 1953) (comments of Professors Henry Hart, Paul Freund, Benjamin Kaplan, Ernest Brown, and Arthur Sutherland). *See* text at n.73, *infra*.

20. S. Res. 334, 106 CONG. REC. 18145. The floor debate is at 106 CONG. REC. 18130 ff. *See also* Report, Recess Appointments of Federal Judges, House Committee of the Judiciary, 86th Cong., 1st Sess. (1959).

the Senate was to concur, there would be security."[21] Accordingly, Article II, section 2 of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States."

As soon as the "appointments clause" was agreed to, Richard Dobbs Spaight of North Carolina moved that "the President shall have 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 the next Session of the Senate."[22] Such debate as there may have been is not recorded. The motion, though, was immediately approved. Accordingly, in Article II the appointments clause and its condition of Senate advice and consent are followed by the proviso (set in the precise terms of Spaight's motion) that "The President shall have 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."

In public debate on the Constitution, comment on the recess appointments clause is slight to nonexistent. In *Federalist No. 67*, however, Alexander Hamilton provided a cogent description of the clause and its purposes, as follows:

> The ordinary power of appointments is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen during *their recess*, which it might be necessary for the public service to fill up without delay, the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments "during the recess of the Senate, by granting commissions which shall expire at the end of their next session."[23]

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21. The Supreme Court has explained the "security" thus provided: "The President's power to select principal officers of the United States was not left unguarded, however, as Article II further requires the 'Advice and Consent of the Senate.' This serves both to curb Executive abuses of the appointment power . . . and 'to promote a judicious choice of [persons] for filling the offices of the union.'" Edmond v. United States, 520 U.S. 651, 659-60 (1997).

22. 2 THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION OF 1798, at 539 (Max Farrand ed., 1966).

23. THE FEDERALIST NO. 67, at 377-78 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (emphasis in original).

Originally, recesses between sessions were in fact long: The first ten recesses averaged seven months in length. In those several months there might be a vacancy in office that if left unfilled would impair the public service. Given the poor communication and transportation by horseback along bad roads, reconvening the Senate was out of the question. Quite sensibly, the President always on the job would if needed fill the vacated office by a temporary appointment.

A matter of greater moment at the constitutional convention was that of establishing the "judicial power of the United States." The Declaration of Independence had charged that the English King "made judges dependent on his will alone for the tenure of their office."[24] The autonomy promised in that declaration is kept by Article III as it provides judges with lifetime tenure and pay protection. In *Federalist No. 78*, Hamilton explained that owing to its "natural feebleness" the judiciary "is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches." Against this threat "nothing," Hamilton said, "can contribute so much to [the judiciary's] firmness and independency as permanency in office."[25]

A little less well known, perhaps, is this additional part of *Federalist No. 78*, wherein Hamilton explained that a faithful attendance to individual rights "can certainly not be expected from judges who hold their offices by a *temporary commission.*" In this respect, he further noted, "Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence."[26] Be that as it may, Hamilton in his significant account of the recess appointments clause, explained that "as vacancies might happen during [the Senate's] recess, which it might be necessary for the public service to fill up without delay, the [appointment clause] is evidently intended to authorize the President . . . to make *temporary appointments.*"[27] The question raised by these accounts, of course is: How are the "temporary appointments" of the recess appointments to be squared with "temporary commissions" inimical to Article III?

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24. Declaration of Independence, ¶ 13 (1776).

25. THE FEDERALIST NO. 78, at 434 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

26. Id. at 439 (emphasis added).

27. THE FEDERALIST NO. 68, at 378 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (emphasis added).

Not readily. Respecting recess appointments, Article II, section 2 clause 3 flatly states that "The President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate" and does so without allowance for judges. As flatly, Article III states that judges "shall hold their offices during good Behavior" and does so without allowance for recess appointees. For any number of people, including the judges in *United States v. Woodley*, these terms established an impasse that cannot be broken by textual analyses.[28] However, textual impasse, as I shall discuss, is not necessarily the case. For the moment, though, let us assume that such impasse is the case. But with impasse thus the case, it does not follow that the conflict between the recess appointments clause and Article III evades resolution.

A. RESOLUTION IN TERMS OF PURPOSES

In the rare circumstance where constitutional provisions are hopelessly at odds, the interpretational process does not stop; it cannot stop when resolution of a case requires resolution of the conflict. As interpretation thus proceeds, it may usefully do so according to the canon that "[constitutional] principles" must be considered as "of equal dignity, and . . . must [not] be so enforced as to nullify or substantially impair another."[29] Brought to bear on recess appointments to the bench, analysis under this canon shows that the independence of the judiciary can be protected without much (if at all) impairing presidential power under the recess appointments clause. In 1787, when Senate recesses were expected to be long and in fact were, there might be a vacated post that if left unfilled would be detrimental to the public service. Today, intersession recesses average not seven months but four weeks or so. In these few weeks there is no seat that if left unfilled for a few weeks would do much damage to the public service, and this is particularly so as regards the bench. Article III judges can be transferred from one court to the other to cover vacancies as they might occur. For these and other reasons, an able constitutional lawyer, Senator Sam Ervin (in debate on the Senate's 1960 resolution against recess appointments to the bench) explained, "there is, really, no crying

28. As explained in *Woodley*, "while Article III speaks specifically about the tenure of federal judges, Article II is equally specific in addressing the manner of their appointment. There is therefore no reason to favor one Article over the other." 751 F.2d at 1010.

29. Dick v. United States, 208 U.S. 340, 353 (1908).

need for the President to make a recess appointment or for having the recess appointee take office."[30]

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.

B. TEXTUAL RESOLUTION—IN TERMS OF RIGHTS—OF THE CONFLICT

Such conflict as exists between Article III and the recess appointments can be resolved, as above, by comparing the purposes of the two provisions. It does not follow, though, that this is the optimal means of resolution. Despite misgivings as in the *Woodley* case, textual resolution of the conflict is possible, which resolution is consistent with case law already in place and is illuminating and serving respecting the values underlying Article III and the public policies underlying the recess appointments clause.

What is this textual solution? To be sure, if here one looks for an explicit solution, a piece of text by which the one constitutional provision allows for the other, resolution cannot be had. But then, resolution by reference to explicit textual aids is not to be expected, not under ordinary methods of constitutional interpretation. As said by John Marshall, a Constitution cannot "partake of the prolixity of a legal code."[31] Accordingly, Justice Scalia has explained that at points of intersection and conflict "the Appointments Clause does not (in the style of the Uniform Commercial Code) contain an explicit cross-reference to Article III."[32] Per Scalia's point, the absence of such aids does not mean that a dissonance between Article III and the President's appointment powers cannot be worked out. Rather, it simply bumps the interpretational work to a more conceptual level.[33] At

30. 106 CONG. REC. 18142-43. Sen. Ervin's remarks here are worth reading. He showed, by examining the district courts, the courts of appeals, and the Supreme Court, that for none of them is any purpose of the recess appointments clause served by recess appointments to the bench. As regards transfers of judges to cover vacated posts, the dissenting judges in the *Woodley* case made the same point as Ervin, saying "interdistrict or intercircuit assignments provide an expedient and effective way of dealing with a short-term problem." 751 F.2d at 1024.

31. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

32. Freytag v. Commissioner, 501 U.S. 868, 901 (1991).

33. For Scalia in the *Freytag* case, the higher generality was structural. It was to "examine the Appointments Clause of the Constitution in light of the 'cognate provi-

this level a difference in quality of between the requirements of Article III and the provision of the recess appointments clause is evident. The clause provides for a discretionary power: The President may or may not cover a vacancy by means of recess appointment. In comparison, the judicial autonomy provided by Article III is stated as a mandate: The terms are that "Judges, both of the supreme and inferior courts, *shall* hold their offices during good behavior." In constitutional design, hard and fast language of this sort operates as a check on discretionary power.

For instance, the First Amendment states, "Congress shall make no laws . . . abridging the freedom of speech." In operation, this provision checks the various (discretionary) powers granted Congress by Article I. However, this restraint thus imposed is not absolute. Instead, the right to free speech is protected by putting Congress to a high burden of justification for a curtailment of the right.[34] As congressional power is thus adjusted to the "shall not" of the First Amendment, so should presidential power under the recess appointments clause be adjusted to the "shall hold their offices during good Behavior" terms of Article III. The first step in this adjustment has been accomplished; the courts have, out of Article III, established the right to a judge free of political domination. In turn, this right should—as do First Amendment rights—check recess appointments to the bench, by requiring that for these and only these appointments the President meet a certain burden of justification.

This burden can be calculated according to the parsimony usually referred to as Occam's razor. Presently, the burden need be no more than to insist that a recess appointment to the bench be compelled by the urgency on which the recess appointments clause is in fact based. This urgency, of course, is the harm to the public service caused by leaving unfilled a vacancy created during a recess of the Senate, which urgency and which burden does no more than to confine presidential power to the terms and purposes of the recess appointments clause. What would be eliminated from the power, and removed only for appointments to the bench, is the various accretions to it that have built up over time, accretions such as appointments outside the plain

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sions' of which it is a central feature: Article I, Article II, and Article III." *Id.*

34. For example, in the context of electoral activities, the burden is that of an "exacting scrutiny" under which a restriction is permissible only if "it is narrowly tailored to serve an overriding state interest." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

terms of the clause and for no reason other than to establish a placeholder's claim to the office.

C. THE CASE LAW THAT ESTABLISHES THE RIGHT

Reconciliation of the terms of Article III with those of the recess appointments clause is sustained by what I have to this point more or less asserted as an Article III right to a judge freed of political domination. Now it is appropriate to establish the bona fides of this right. An original expression of it is that of *Federalist No. 78,* as follows: "That inflexible and uniform adherence to the rights of the Constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission."[35] The same point—now in opposition to a recess appointment to the bench—came to be made in the Senate: "Since the provision for lifetime tenure for Federal judges is clearly for the benefit of litigants rather than for the benefit of the judges themselves, this provision must be regarded as one of the constitutional guarantees of civil rights, and this right of a trial before a lifetime judge or judges is as much a right of every litigant as his right of trial by jury in criminal cases."[36]

Of course, a "right of a trial before a lifetime judge" is most authoritatively established by the courts. In *Glidden v. Zdanok*,[37] judges from the Court of Claims and the Court of Customs and Patent Appeals had been assigned to the circuit courts of appeals. Litigants then claimed that the participation of these judges in their cases denied them "the protection of judges with tenure and compensation guaranteed by Article III."[38] The Supreme Court denied this contention inasmuch as "the Court of Claims and the Court of Customs and Patent Appeals are courts created under Article III" and judges from these courts "are and

35. THE FEDERALIST NO. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

36. Nomination of Potter Stewart, Sen. Jud. Comm., Ex. Report No. 2, 86th Cong., 1st Sess., at 2, 7 (Apr. 29, 1959). By reference to the work of John Marshall, the modern Supreme Court has made much the same point. "A judge's decision may affect an individual's 'property, his reputation, his life, his all.' In the 'exercise of these duties,' the judge must 'observe the utmost fairness.' The judge must be 'perfectly and completely independent, with nothing to influence or contro[l] him but God and his conscience.'" United States v. Hatter, 532 U.S. 557, 569 (2001), *quoting* Proceedings and Debates of the Virginia State Convention, of 1829-1830, 616, 619 (1830).

37. 370 U.S. 530 (1962).

38. *Id.* at 533.

have been protected in tenure and compensation."[39] While the Court thus found that the right had not been violated, the existence of the right, to be heard by judges "protected in tenure and compensation" is implicit in the opinion. In *Northern Pipeline Const. Co, v. Marathon Pipe Line*,[40] the right implicit in *Glidden* won out, causing the Court to overturn the Bankruptcy Act of 1978.

Northern Pipe Line had sued Marathon in federal bankruptcy court for damages for breach of contract. Under the 1978 Act, bankruptcy judges did *not* have life-tenure; rather, they were appointed for fourteen-year terms. This being the case, Marathon moved to dismiss the suit against it, on the grounds that the 1978 Act "unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution."[41] In reviewing this motion, the Supreme Court started with this premise: "'A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.'"[42] Because bankruptcy judges did not have the requisite tenure and pay protections, the Court then held that Congress had unconstitutionally placed "judicial Power" in these judges and in doing so had denied that right. Which holding of course forces this question: If a bankruptcy judge with a fourteen-year appointment and holding only some of the judicial power cannot exercise that power, how can a recess appointee with a one-year term be invested with all of the judicial power?

Following the *Northern Pipeline* case, the Court in *Commodity Futures Trading Commission v. Schor*[43] examined whether and why Congress might assign some part of the judicial power to administrative agencies. In this effort, the Court assessed the "purposes" of Article III and in doing so identified two. One purpose was structural, which the Court described as the "public function" of checking the other parts of government as they might try to expand their power beyond constitutionally assigned limits.[44] The other purpose was personal, that of a "personal guarantee of an independent and impartial adjudication," which guarantee the

39. *Id.* at 532, 584.
40. 458 U.S. 50 (1982).
41. *Id.* at 56.
42. *Id.* at 57 (quoting United States v. Will, 449 U.S. 200, 217-18 (1980)).
43. 478 U.S. 833 (1986).
44. *Id.* at 847.

Court described as the "personal right" to "have claims decided before judges who are free from potential domination by other branches of government."[45]

Currently, the right to a judge free of political domination gains strong support from the Supreme Court's 2003 decision in *Nguyen v. United States*.[46] Defendants in a criminal case had appealed their conviction in a territorial court, the District Court of Guam, to the Ninth Circuit. That circuit then affirmed the conviction. However, the panel that heard the appeal consisted of two Article III judges plus a territorial judge selected from the South Pacific region that had been the site of the trial. This judge had been placed on the panel under 28 U.S.C. § 292(a), which provides, "The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals . . . whenever the business of that court so requires." The territorial judge thus selected had been appointed to the bench for a term of ten years, within which term the judge could be removed by the President "for cause."[47] Because he lacked lifetime tenure, the territorial judge that heard defendants' appeal was not an Article III judge, a matter defendants raised (for the first time) in their petition for review of that decision by the Supreme Court.

Before the Supreme Court, petitioners argued (1) their constitutional right to be heard only by Article III judges and (2) certain statutory grounds. The Court found for the petitioners on the statutory grounds. It held that the act, 28 U.S.C. § 292(a), under which the territorial judge had been assigned to the Ninth Circuit panel allowed for assignments of only Article III judges to the circuit courts. For the Court, Justice Stephens referred to "Congress' decision to preserve the Article III character of the courts of appeals" and found that "Section 292(a) does not permit any assignment to the courts of appeals of a district judge who does not enjoy the protections set forth in Article III."[48]

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45. *Id.*

46. 123 S. Ct. 2130 (2003).

47. The court from which the territorial judge had been selected, the District Court for the Northern Marianna Islands, was an Article I court, established by Congress pursuant to its authority to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." 123 S. Ct. at 2134-35.

48. *Id.* at 2137. The decision was 5-4. However, the dissenting justices agreed that a non-Article III judge could not be assigned to the Article III court. They dissented because the petitioners while knowing that the Ninth Circuit panel included a non-Article III judge had without objection briefed and argued their case before that panel. Only after they lost did they object by means of their petition for Supreme Court review. The dissent was therefore of the opinion that petitioners had waived their right to complain of

Accordingly, the Court vacated the Ninth Circuit proceeding because it included the non-Article III judge. Having thus disposed of the case on statutory grounds, the Court as a matter of course did not address the petitioner's constitutional arguments.[49] But considering that the statutory decision was underwritten by the "strong policy" (derived from Article III) of reserving federal courts for Article III judges, the decision considerably supports the constitutional right (derived from Article III) to a politically independent judge.[50]

D. APPLICATION OF THE RIGHT TO RECESS APPOINTMENTS: THE *EX PARTE WARD* AND *WOODLEY* CASES

A recess appointee gains a temporary appointment, good only until the end of the next Senate session. Whether the appointee gains a permanent commission depends (1) on whether in that next session the President nominates the appointee for a permanent commission and (2) on whether the Senate then confirms that nomination. In these circumstances, the appointee remains subject to political pressures.[51] These pressures might not at all influence a judge's handling of a trial. Or consciously or

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the composition of the panel. *Id.* at 2139.

49. The Court stated, "Petitioners contend that the participation of an Article IV judge on the panel violated structural constitutional guarantees embodied in Article III and in the Appointments Clause, Art. II, § 2, cl. 2, of the Constitution. We find it unnecessary to discuss the constitutional questions because the statutory violation is clear." 2135 at n.9. *Nguyen* thus seems an application of the canon that " 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" Solid Waste Agency v. Army Corps of Eng'rs, 531 U.S. 159, 173 (2001).

50. Moreover, this policy, as *Nguyen* showed, is exceptionally strong. The Court found that the violation of it was not subject to waiver, as by the petitioner's failure timely to object to the non-Article III judge. Nor could the violation be excused by an assertion of no prejudicial error. The count of no prejudicial error was that the three-judge panel that upheld the petitioners' conviction had done so unanimously. Therefore, the decision was supported by two Article III judges who provided the majority upon which the decision could be upheld. But as against allowing a judge without the tenure provided by Article III to sit on a court constituted under this Article, the government's argument of prejudicial error was to be of no avail. 123 S. Ct. at 2138.

51. As found by the original panel in *Woodley*, "a judge will scarcely be oblivious to the effect his decision may have on the vote of these officials." 726 F.2d. at 1330. That the on-the-bench performance of a recess appointee will indeed be reviewed by the Senate is indicated by the confirmation debate on Judge Gregory, where it was noted that "His performance on the bench since his [recess] appointment has been uniformly praised." 147 CONG. REC. S7988 (July 20, 2001). Also, it was noted, by Sen. Warner of Virginia, "Many, if not all, Senators are concerned about judicial activism. The judicial's special role is to interpret the law, not make law. Judge Gregory assured me he will follow this traditional role." *Id.* at S7990.

unconsciously, the judge might be influenced: She might act in a politically correct way or, instead, she might, by bracing herself against the pressure, overreact in the opposite direction.[52] Whether these pressures in fact influence a decision in these ways is usually neither provable nor disprovable, which is a reason that Article III precludes this influence be it real or potential. Accordingly, as expressed by the Court the right to a judge free of political domination specifically precludes the "potential" of such domination. The right is to "have claims decided before judges who are free from *potential* domination by other branches of government."[53]

That a recess appointee is subject to the "potential domination" of the President and Senate is, then, a self-evident statement of fact. This fact was first asserted in 1899 in *Ex Parte Ward*.[54] Here, the defendant in a criminal case used the writ of habeas corpus to ask that his conviction be overturned because the judge who convicted him had not been "authorized to exercise any portion of the judicial power."[55] Before the Supreme Court, his argument was that "the president could not during the recess of the Senate and without its concurrence, by his commission invest an appointee with any portion of the judicial power of the U.S. Government as defined in Article III of the Constitution, because that article requires that judges of the U.S. courts shall hold their office during good behavior."[56]

That argument was well stated. Nonetheless, the Court declined to hear it on the grounds, good at the time, that the power of a "*de facto*" judge could not be challenged. "*De facto*" meant that the court (as opposed to the judge) otherwise had jurisdiction and this jurisdiction was sufficient to validate a decision. Today, though, at least for claims that judges do not have proper Article III credentials, the Supreme Court has done away with

52. In the 1960 debate on recess appointments to the bench, Senator Hart noted: A litigant may "for the rest of his life wonder" whether an appointee had succumbed to pressure from the Senate or the President or had instead "rear[ed] back and ben[t] the other way in order to prove that he was not subservient to such pressure." 106 CONG. REC. 18134 (1960). For an account, of the possibilities and subtleties of this influence *see* Judge Norris's dissenting opinion in the *Woodley* case. 751 F.2d at 1022-23.

53. *E.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (emphasis added); *see also* Glidden Co. v. Zdanock, 370 U.S. 530, 533 (1963) ("Article III, sec.1, however, is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record").

54. 173 U.S. 452 (1899).

55. *Id.* at 454.

56. *Id.* at 453-54.

this doctrine. In *Glidden v. Zdanok*,[57] where litigants asserted that an assignment of judges from the Court of Claims and the Court of Customs and Patent Appeals to circuit courts of appeals denied them "the protection of judges with tenure and compensation guaranteed by Article III," the government claimed that this assertion of right was barred by the *de facto* judge doctrine.[58] The Court rejected this claim, finding that that while the doctrine was usefully concerned with the efficiencies gained by protecting judgments from collateral attack, these efficiencies were not of such weight as to preclude a court from determining whether a judge not fully qualified under Article III could decide cases. Specifically, the Court ruled that the doctrine does not apply to "basic constitutional protections designed in part for the benefit of litigants," which protections included the right to a judge free of political domination.[59]

Accordingly, when this was asserted in *United States v. Woodley*, the "*de facto* judge" doctrine was no longer a bar. The facts of *Woodley* were that ahead of turning over his office to President-elect Reagan, President Carter placed Judge Walter Heen on the bench by means of a recess appointment. Judge Heen then presided over the trial and conviction of Janet Woodley on drug charges. In Ms. Woodley's appeal from that conviction, the Ninth Circuit on its own motion questioned whether Ms. Woodley's conviction had been consistent with her right to be heard by an autonomous court, because "[a] judge receiving his commission under the recess appointments clause may be called upon to make politically charged decisions while his nomination awaits approval by popularly elected officials."[60] Following what it found to be controlling Supreme Court precedent (*Glidden* and *Marathon*), the court then vacated the lower court decision. On the government's strong urging, the Ninth Circuit then reheard the case *en banc*.

En banc, the circuit split 7 to 4. The dissenting judges, as we have said, would have decided the case by identifying and then reconciling the purposes underlying the recess appointments clause and Article III. This decisional process was altogether proper and fitting. It entailed an analysis of constitutional structure so as not to warp it. Giving due consideration to the purpose of recess appointments, that of not rendering an office dys-

57. 370 U.S. 530 (1962).
58. *Id.* at 533.
59. *Id.* at 535-36; *see also* Nguyen v. United States, 123 S. Ct. 2130, 2135-37 (2003).
60. 726 F.2d 1328, 1330 (9th Cir. 1983).

functional for not being promptly filled, the dissenters' found that no such dysfunction called for Judge Heen's appointment. On the other hand, the Article III value in judges freed from political domination was substantially breached as Judge Heen undertook to hear cases prior to Senate confirmation.

The majority did not dispute these conclusions by the dissent; rather, it ignored them. As charged by the dissent, the majority simply "omit[ted] the step of weighing competing values, resulting in a truncated analysis almost entirely based on historical analysis."[61] On the basis of a surely truncated history, the majority found "an unbroken" acceptance of a practice of recess appointments to the bench and found that this practice now controlled the constitutional scheme of things. This resort to history seriously complicates present studies. As said by Judge Norris in his dissent in *Woodley*:

> Thus, could we set historical practice aside, I believe our decision today would be relatively easy.... [T]he principle that animate the salary and tenure provisions of Article III—judicial independence and separation of powers—clearly outweigh the concerns of expediency and efficiency that underlie the Recess Appointments Clause. In other words, if we were writing on a clean slate, if we were reviewing Judge Heen's recess commission without history to support it, I find it inconceivable that we would interpret the Constitution as the majority does today–subordinating Article III values to the executive's general power to make recess appointments.[62]

But because the majority in the one full dress decision in this area did find history determinative, history cannot now be ignored and to it we turn.

II. THE HISTORY RESPECTING THE RIGHT

By itself an executive practice may be nothing more than an extended usurpation of power.[63] The checks and balances provided by the Constitution can, however, help determine whether usurpation or legitimacy is the case. Opposition by Congress or the courts helps to identify usurpation; their acquiescence helps

61. 751 F.2d 1008, 1020 (9th Cir. 1985).

62. *Id.* at 1024 (Norris, J., dissenting).

63. The prominent authority that a historical practice in and of itself cannot alter the power held by a branch of government is, of course, INS v. Chadha, 462 U.S. 919 (1983), where a sustained congressional practice of "legislative vetoes" did not save that practice from being overturned by the Supreme Court.

to mark legitimacy.[64] Accordingly, the majority in *Woodley* adduced history that it said showed "an *unbroken acceptance* of the President's use of the recess power to appoint federal judges by the three branches of government."[65] That history, though, is deficient in that it did not in fact show an "acceptance" by the other branches, not of the practice actually in question. This practice was not recess appointments *per se* but whether a recess appointee's hearing of a case prior to his confirmation violated the litigant's right to be heard by a judge freed of political pressure. A history of recess appointments to the bench is one thing; a history of those appointees hearing cases prior to confirmation is something else. This point in mind, we now review the history.

A. SUPREME COURT PRACTICE

The practice of recess appointments to the bench is commonly said to have begun with that of John Rutledge in 1795. These accounts are substantially but not perfectly correct. The first such appointment, which incidentally involved Rutledge, occurred four years earlier in 1791. In its first term, the Supreme Court met for ten days and heard no cases. John Rutledge was a member of that Court, although he was, as he said, disappointed at not being appointed Chief Justice. After that Term Rutledge resigned to become Chief Justice of the South Carolina Supreme Court. George Washington filled his vacated seat by what was the first recess appointment, that of Thomas Johnson in 1791. This appointment was confirmed six weeks later, well before Johnson heard any cases.

When John Jay resigned as Chief Justice in 1795, Rutledge wrote President Washington to say that while it would be unbecoming for him to apply for that position he was indeed available. Washington quickly replied, telling Rutledge that the Chief Justice seat was his. Inasmuch as the Senate was then deep in its recess, this appointment was a recess appointment. Owing to some combination of Rutledge's impolitic remarks and a perception of unfitness, this appointment was not well received. Just

64. Thus Frankfurter, in his classic statement of the gloss-of-history method of constitutional interpretation, referred to an "executive practice, long pursued to the knowledge of the Congress." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (concurring); *see also* United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915) ("the long, continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands"). 751 F.2d at 1011 (emphasis added).

before Rutledge took his seat on the bench, he publicly spoke against the "Jay Treaty" with Great Britain. This treaty was dear to the Federalist majority in the Senate and they fell on Rutledge with some vehemence, as shown by this letter from Attorney General Bradford to Alexander Hamilton: "That crazy speech of Mr. Rutledge, joined to certain information that he is daily sinking into debility of mind and body, will probably prevent him receiving the appointment." It did. When the Senate convened, it rejected his nomination. In the meantime, Rutledge, by means of his temporary appointment, took his seat with the Court and participated in two decisions. After the Senate refused to confirm his nomination, Rutledge resigned without finishing the term to which he had been appointed, saying he felt unsuited to the position.[66]

Fifty-six years passed, and then Benjamin Curtis was the next recess appointee to hear cases before he was confirmed. He was appointed by Millard Fillmore on September 22, 1851, was sworn in October 10, and then was on the bench for twenty days before he was confirmed. In that brief period, though, he participated in two decisions. When Curtis accepted his appointment, he wrote the President that he wished to assume his circuit duties as soon as possible, owing to "a term on the Circuit Court at Boston ... at which my presence is very desirable."[67] The pressing matter at Boston seems to have been "The Fugitive Slave Trials." A "young man of color, who was a member of the bar" had been indicted under the Fugitive Slave Law because he had participated in the "forcible rescue" (from the marshal's office at the federal court in Boston) of an escaped slave. Local feeling ran high in favor of that young man. Under his temporary appointment, Justice Curtis presided over his trial, in which he made an unpopular ruling against "jury nullification." Defendant's counsel had asked Curtis to instruct the jury that it might disregard the Fugitive Slave Law if it found that statute to be unconstitutional. Curtis refused to do so. The defendant, however, was not convicted, in part because of favorable rulings by Curtis on evidentiary matters.[68]

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66. His words, in his letter of resignation, were that "it takes a Constitution less broken than mine." Louis Fisher, Recess Appointments of Judges 14, Cong. Research Serv. Report for Cong. (2002); *see* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 127-29, 131, 133, 137 (1922).

67. THE LIFE AND WRITING OF BENJAMIN ROBBINS CURTIS 156 (1879).

68. United States v. Robert Morris, 26 F.Cas. 1323 (1851) (No. 15,815); *see* LIFE AND WRITING OF BENJAMIN ROBBINS CURTIS, *supra* note 67, at 160-63; 1 WARREN, *supra* note 66, at 500-03.

Justice Curtis was known as person of considerable integrity, unlikely to be swayed by political or popular pressure, which did not mean he was not subject to such pressure because he was not yet confirmed. Some indication of this pressure was given at a memorial service on Curtis's death. One of the presenters that day was Richard Dana. Apart from giving his name, Curtis's biography does not identify Mr. Dana. However, in the *Federal Cases* report of *The Fugitive Slave Trials*, counsel for the defendant is listed as "R.H. Dana."[69] "About twenty-two years ago," said Dana at Justice Curtis's memorial, "the bar, the political world, the public were extremely excited by the Fugitive Slave trials." Justice Curtis, though, "conduct[ed] the trials with impartiality," and, indeed, with an "affirmative determination that the trials should be done with absolute fairness." That determination was to Dana all the more remarkable because it was exerted against a certain pressure: "*And they who remember how things stood in Washington in those days will see the force of the suggestion that Judge Curtis had not been confirmed by the Senate, but was acting upon an executive appointment made during a recess of the Senate.*"[70]

A century passed in which three recess appointments were made to the Supreme Court. None of these appointees, Justices Davis, Harlan, and Holmes, heard cases prior to their confirmation. In time, the fact that they had not heard cases prior to their confirmation was declared to be good practice. In 1937 and under the threat of a recess appointment to the Court by President Franklin D. Roosevelt, a point of objection raised in the Senate was that heretofore Justices had not "taken their seats upon the bench until they have been confirmed by the Senate of the United States." Were an unconfirmed judge to decide a case, that action, it was said, "would seriously reflect upon the ethical standard of the nominee."[71] On that occasion the following resolution was submitted to the Senate: "That it is the sense of the Senate that an appointment to the Supreme Court should be made only at such time as the Senate may act upon confirmation

69. 26 F.Cas. at 1323 (No. 15,815).

70. LIFE AND WRITING OF BENJAMIN ROBBINS CURTIS, *supra* note 67, at 162-63 (emphasis in original).

71. 81 CONG. REC. 8002 (1937). There were several other expressions of ethical concerns. *E.g.*, "I don't think any self-respecting lawyer would . . . serve as a member of the Supreme Court of the United States during the interim before being confirmed by the Senate. *Id.* at 7995. The fact that Holmes had not taken his seat prior to confirmation was seen as "a clear ethical demonstration . . . there ought not to be . . . any sitting Justices who have not been confirmed." *Id.* at 8000.

prior the entry of the nominee upon his service."[72] No vote was taken, though, probably because President Roosevelt drew back from the threatened appointment.

Twenty years later President Eisenhower made his recess appointments to the Supreme Court. Why he chose this route of appointments is, so far as I know, unknown. But starting with Warren, the three justices he appointed commenced to hear and decide cases before the Senate confirmed their tenure. No one suggested that the prospects of confirmation in any way swayed these Justices in these cases. Be that as it may, the idea that unconfirmed judges are subject to unacceptable political pressures came to the fore. For instance, Professor Henry Hart objected to Earl Warren's appointment as follows:

> Governor Warren cannot possible have this independence if his every vote, indeed his every question from the bench, is subject to the possibility of inquiry in later committee hearings and floor debates to determine his fitness to continue in judicial office.... The point is not what Governor Warren and his friends will think about his disinterestedness but what defeated litigants will think....[73]

Thereafter, Senator Joseph McCarthy rudely illustrated "the possibility of inquiry." During Justice Brennan's confirmation hearings the Senator asked him how he felt about "rooting out subversives." Justice Brennan replied, "Will you forgive me an embarrassment, Senator. You will appreciate that I am a sitting Justice of the Court. There are presently pending before the Court some cases in which I believe will have to be decided the question what is communism."[74]

At Justice Stewart's confirmation hearing, the case that recess appointees should not hear cases prior to Senate confirmation assumed its modern form, that of a violation of a core constitutional right. The dissent to Justice Stewart's confirmation argued as follows:

> No man can be a Federal judge until he has been appointed and commissioned to serve during good behavior.... Since the provision for lifetime tenure for Federal judges is clearly for the benefit of litigants rather than for the benefit of the

72. *Id.* at 7963. The Senate opposition to Roosevelt's threat of a recess appointment is further discussed at *supra* notes 100-103.

73. 17 HARVARD LAW SCHOOL RECORD 1-3 (Oct. 8, 1953).

74. Nomination of William J. Brennan, Jr., Sen. Jud. Comm. 17 (85th Cong., 1st Sess. 1957).

> judges themselves, this provision must be regarded as one of the constitutional guarantees of civil rights, and this right of a trial before a lifetime judge or judges is as much a right of every litigant as his right of trial by jury in criminal cases.[75]

This objection—grounded in the "right of a trial before a lifetime judge"—was studiously made, possibly owing to the groundwork of a Senate Judiciary Committee study, delivered January 19, 1959, on "Recess Appointments and Federal Judges."[76] This lengthy report delineated the conflict between recess appointments and judicial independence and tried to identify what the Senate might do to alleviate the conflict. And here was the rub: Exactly what could the Senate do? Presidential power under the recess appointments clause is exercised without Senate participation and for this reason seems beyond constraint by that body. (One thing Congress can do and has done, though, is to refuse to pay an officer improperly appointed under the recess appointments clause.)[77]

On that occasion what the Senate did do was as follows. After the Stewart confirmation hearings, the Senate Judiciary Committee submitted the following resolution to the Senate:

> That it is the sense of the Senate that the making of recess appointments to the Supreme Court of the United States may not be wholly consistent with the best interest of the Supreme Court, the nominee who may be involved, the litigants before the Court, nor indeed, the people of the United States, and that such appointments, therefore, should not be made except under unusual circumstances and for the purpose of preventing a demonstrable breakdown in the administration of the Court's business.[78]

While this resolution was directed to Supreme Court appointees, the debate on it addressed federal judges in general. Various questions were raised. One question was whether the Senate could forthrightly determine the qualifications of a nominee already on the bench. "It would be a little difficult," it was said, "with our attitude and our regard for the law, to have a man

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75. Nomination of Potter Stewart, Sen. Jud. Comm., Ex. Report No. 2, 86th Cong., 1st Sess. 2, 7 (Apr. 29, 1959).

76. House Judiciary Comm., *Recess Appointments of Federal Judges*, 86th Cong., 1st Sess. (1959). The report was prepared by the committee staff and the American Law Division of the Library of Congress.

77. *See* Tenure in Office Act, 28 U.S.C. § 5503 (2000); *infra* notes 98-99.

78. S. Res. 334, 106 CONG. REC. 18,145 (1960). The floor debate is at 106 CONG. REC. 18,130.

walk into committee who is wearing the judicial robes, after seven or eight decisions, [and] be questioned with reference to his competency."[79]

The next question was about the constitutionality (and propriety) of a judge yet subject to the political pressure of confirmation sitting down to try cases. These ill-effects of these pressures were described as follows: A litigant "may for the rest of his life wonder" whether his case was influenced, consciously or unconsciously, by the temporary judge's knowledge that he must please the President, so that he does not withdraw the judge's nomination, and the Senate, so that it confirms him. The judge might bend to these pressures or he might do the opposite; he "might rear back and bend the other way in order to prove that he was subservient to neither branch." Senator Ervin, himself a former state supreme court justice, identified these pressures as contrary to Article III, saying:

> [T]he third article of the Constitution . . . clearly contemplates that the federal courts shall be presided over by judges who hold office for life. . . . Therefore, it is somewhat inconsistent with the spirit of the third article . . . for a judge to make decisions when he does not occupy his office for life but only until the next session of the Senate.[80]

The resolution was then adopted by the Senate.

B. LOWER COURT PRACTICE

History, unfortunately, does not always generate a sharp resolution of a problem. In addition to the history above, of a pronounced opposition to Supreme Court appointees hearing cases prior to confirmation, there is also a heretofore unknown history respecting lower court appointments. This history blurs the sharper picture offered by appointments to the Supreme Courts.

Nowhere, not in public debate, in Congress, in the courts, or in scholarly commentary has this lower court practice respecting recess appointments been previously presented, which inatten-

79. 106 CONG. REC. 18,136 (1960). The same objection had been made in the floor debate in 1937: "The Senate is not a free agent to pass upon the credentials of the nominee if the nominee . . . has clothed himself with the robes of office, has participated in Court proceedings, deliberations and decisions . . . and then comes before the Senate for confirmation." 81 CONG. REC. 7999 (1937) (Sen. Vandenberg)

80. 106 CONG. REC. 18,143 (1960).

tion seems to have been because of a lack of records.[81] It turns out, though, that there is a probably adequate database. In the *Woodley* cases, the Ninth Circuit ordered the Justice Department to prepare a record of recess appointments to the federal courts, which record was then prepared and appended to the Department's brief in the case.[82] That appendix lists recess appointments from the 1790s to Judge Heen in 1980 to the lower courts. That appendix, though, provides no information respecting the question at hand, which is whether those judges, prior to being confirmed by the Senate, heard and decided cases.

We can now derive the date that would enable us to answer this question. While the Justice Department-prepared index does not contain information itself sufficient to generate this answer, it does supply a key: The index provides the dates that lower-court judges received their recess appointment and the dates they were confirmed. With these judges and these dates, common electronic databases can today be checked to see whether these judges signed and delivered any opinions in the period between their recess appointment and later Senate confirmation. This cross-checking shows that a significant number of them did hear cases prior to their confirmation.

There have been 294 recess appointments to the lower courts. Roughly thirty-one percent of them heard and decided cases prior to their confirmation.[83] Unlike the Supreme Court,

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81. For example, the Congressional Research Service has noted the lack of records: "Before July 1965 . . . recess appointments were recorded in a haphazard fashion. Although the Congressional Record is the best source . . . it is neither complete nor wholly reliable." Memorandum, Government Division, Congressional Research Service, Library of Congress, to Senate Committee on Banking, Housing and Urban Affairs (Mar. 13, 1985), *quoted in* Michael A. Carrier, *Note, When is the Senate in Recess for Purposes of the Recess Appointments Clause*, 92 MICH. L. REV. 2204, 2209 n.31 (1994).

82. Second Supplemental Brief for Appellee, United States v. Woodley, 726 F.2d 1328 (9th Cir. 1983) (No. 82-1028). The Justice Department prepared list of appointees and dates in large part from files maintained by the Deputy Attorney General. In other parts (appointments in the 1800s) that list had to be "reconstructed" from records originally kept by the State Department.

83. These numbers should stand even if the records, as they surely are, are only roughly accurate. No complete central record of such appointments was kept and the Justice Department had to reconstruct some parts of its index from State Department files. Given its position in the *Woodley* case, the Justice Department would not likely under-report the number of recess appointments. Nor would electronic databases over-report the number of opinions signed by these appointees prior to their confirmation. Therefore, combining the list of appointees with electronic convincingly shows that recess appointees to the lower federal courts did hear a significant number of cases prior to the Senate confirmation of these judges. It is unlikely that unreported opinions would change this conclusion. An appendix, identifying the lower court judges and whether or not the judges so appointed heard cases prior to confirmation, can be obtained from the author at lawwtm@emory.edu.

there are not the same long gaps—the century between Curtis and the Eisenhower appointees—between recess appointees who heard cases prior to their confirmation. In the lower courts, the gaps of any significance are an initial thirty-four years (from 1796 until 1828) when no recess appointees heard cases prior to their confirmation. From 1828 until 1891 there is a spattering (six) of recess appointees who heard cases before they were confirmed. From 1891 until 1980, there is, though, a steady drumbeat of recess appointees hearing cases prior to confirmation, up until the contested fact of Judge Heen hearing a case in 1980. From Judge Heen's appointment until that of Judge Gregory in 2000, there is a twenty-year gap.

What are we to make of this record respecting lower court appointments? In trying to answer this question, we should keep in mind that the lower court practice is but one part of the puzzle; recess appointments to the Supreme Court are the other part and these appointments have been the subject of significant senatorial opposition. Also, if history is to be the guide we should focus on the key factor of ratification. Was the Senate aware of and did it acquiescence to these judges hearing cases prior to their confirmation? In the Senate, this lower court practice seems to have gone without remark if not entirely unnoticed. I find no reference to the practice in recorded debate. However, when President Eisenhower's Supreme Court appointees heard cases prior to their confirmation that fact was noticed, debated, and disapproved of in the Senate. That disapproval was in fact cast in general terms that included lower court judges, as in "it is somewhat inconsistent with the spirit of the third article . . . for a judge to make decisions when he does not occupy his office for life but only until the next session of the Senate."[84]

Turning now to the courts we ask the same question: Has the judiciary ratified a practice of lower-court appointees hearing cases prior to their confirmation? The courts will be silent until a case is brought.[85] After the Supreme Court ruling in 1899 in *Ex Parte Ward*, that the courts lacked jurisdiction to determine whether a trial by a recess appointee violated Article III, no such cases would likely be brought. None were, until the jurisdictional objection was eliminated and the stir generated by

84. 106 CONG. REC. 18,143 (Sen. Ervin).

85. As said by Judge Norris in United States v. Woodley, 751 F.2d 1008, 1028-29 (9th Cir. 1985), "Because the judicial branch is passive, it cannot to an assertion of power by the political branches until third parties present the courts with a concrete case or controversy. Judicial silence simply cannot be construed as judicial acquiescence."

the Eisenhower appointees brought the right to the fore. Therefore, those judges in *Woodley* who found that the courts were part of an "unbroken acceptance" of recess appointees deciding cases put the cart before the horse. These judges may have started a history of judicial assent but they could not have been relying on such a history because it did not then exist.

III. THE HISTORY RESPECTING THE POWER

The personal right to a judge free of political domination stands to check executive power under the recess appointments clause. Apart from this matter of right, previous to it actually, there is the separate question of whether, under the terms of the clause, there is such a power at all. The recess appointments clauses gives the President the power to fill vacancies "that may happen during the Recess of the Senate." Today, intersession recesses have shrunk from an original seven months to four or five weeks. In these short recesses vacancies of any consequence are less likely to occur; consequently, there are few occasions for the power. However, the recess appointments clause has come into another and larger use, for appointments made not during a recess but prior to the recess. Such was the case with the Clinton and Bush recess appointments to the bench. If the power to make appointments were made subject to, and then limited by, the "during the recess" terms of the clause, then for all practical purposes the power to make such appointments to the bench disappears.

However, this particular text-based solution to the recess appointments to the bench is thought to be unavailable, on the grounds that history has enlarged the clause to include appointments to fill vacancies created prior to the recess in which they are made. This history is the subject of the next section. In this section, please keep in mind—as courts and commentators have not—that these materials, while they do relate, are not directly and primarily about the right to be heard by a judge free of political domination. Instead they are largely about the Senate prerogative of advice and consent and whether a recess appointment that exceeds the power invested in the President by the recess appointments clause violates the "just rights of the Senate."[86]

86. *E.g.*, 12 Op. Att'y Gen 32, 41 (1861).

A. THE ATTORNEY GENERAL OPINIONS

When Congress admitted Florida to the Union in 1845, it provided for a federal district court judge, a United States Attorney, and a federal marshal for the new state. The Senate recessed before these offices were filled, whereupon this question was presented to Attorney General Mason: "[h]ave you now, in the recess of the Senate, the power to appoint the district judge, the district attorney, and the marshal?" Mr. Mason's opinion was that the President *lacked* the power. "If vacancies are known to exist during the session of the Senate, and nominations are then made," he said, "they cannot be filled by recess appointments in the recess of the Senate."[87] Inasmuch as these vacancies did not "happen during the recess of the Senate," they outran the power provided by the clause. However, this conclusion is not that arrived at by most attorney general opinions. These opinions commenced with that of Attorney General William Wirt in 1823.[88] In this opinion Mr. Wirt changed the terms of the clause.

When the Senate adjourned without confirming his nominee to fill a vacancy at the Port of New York, President Monroe asked Attorney General William Wirt whether the position could be filled a recess appointment. Mr. Wirt's opinion was yes it could. In Mr. Wirt's view, the clause's purpose was to allow the President to fill a vacancy no matter when it was created. The clause "does not look to the moment of the origin of the vacancy," he said, "but to the state of things at the point of time at which the President is called on to act."[89] This true purpose, though, could only be arrived at by modifying the terms of the clause, which Mr. Wirt did as follows: "Now if we interpret the word happen as being merely equivalent to 'happen to exist'," he said, "the whole purpose of the constitution is completely accomplished."[90]

The text of the clause was thus expanded to read, "vacancies that may happen [to exist] during the recess of the Senate." If not the "literal" text of the Clause, Mr. Wirt explained, this was its "substantial meaning."[91] Subsequent Attorneys General

87. 4 Op. Att'y Gen. 361 (1845); *accord* Schenck v. Peay, 21 F. Cas. 672, 674 (E.D. Ark. 1869) (No. 12,451).

88. 1 Op. Att'y Gen. 631 (1823).

89. *Id.* at 633. As Mr. Wirt saw it, a vacancy left unfilled, albeit outside the literal terms of the clause, "may paralyze some essential branch of our internal police." *Id.* at 632.

90. *Id.* at 633.

91. *Id.*

repeated, endorsed, and expanded this reconstruction of the clause.[92] In 1866, the following question was put to Attorney General Henry Stanbery: If a recess appointment is made to a post and if there is no permanent appointment (for whatever reason) to that post during the next session of the Senate, may the President again fill the post by another recess appointment?[93] Answering yes, Mr. Stanbery provided an open-ended definition of the occasions on which executive power might be exercised. Such power, he said, "should always be capable of exercise." On this basis, Mr. Stanbery reasoned that a President might daisy chain recess appointments as follows:

> As these appointments are to continue until the end of the next session of the Senate, the President might omit to make any nomination to the Senate, and then, in the ensuing recess, reappoint the same or other officers, and thus throughout his term of office defeat entirely any participation on the part of the Senate.[94]

B. CONGRESSIONAL REACTION

At about this point in time, the Congress acted. It acted against daisy-chaining recess appointments and, more importantly, against the idea that the President might, without Senate confirmation, fill a post not vacated during the recess in which it was made. In 1863, the Senate directed its Judiciary Committee to "inquire . . . whether the practice . . . of appointing officers to fill vacancies which have not occurred during the recess of Congress . . . is in accord with the Constitution; and if not, what remedy shall be applied."[95] The Judiciary Committee, as it said, endeavored to understand the clause according to its "true intent and meaning." From this perspective, the recess appointment clause was best read as limited to its "plain, popular" meaning, which was that the President might fill only those vacancies in fact created during the recess in which the appointment was made.[96] The remedy the Committee proposed was that if a President wished to fill a post vacated prior to the recess, he should do so by assigning the post to an official already confirmed by the Senate.

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92. *See, e.g.*, 2 Op. Att'y Gen. 525 (1832) (by Roger Taney as Attorney General).
93. 12 Op. Att'y Gen. 32 (1866).
94. *Id.* at 40.
95. Sen. Report No. 80, Sen. Judiciary Committee, 37th Cong., 3d Sess. at 1 (1863).
96. *Id.* at 5.

Congress, though, found a stronger remedy in its power of the purse. In 1863 Congress provided that "No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy, in any existing office, if the vacancy existed while the Senate was in session. . . ." Clearly, this act was more than a pay provision. As was then explained by Senator Fessenden, "It may not be in our power to prevent the appointment, but it is in our power to prevent the payment; and when payment is prevented, I think that will probably put an end to the habit of making such appointments."[97]

In 1867, the no-pay provision of the 1863 enactment was wrapped into the Tenure of Office Act, which Act in amended form remains in effect today.[98] This Act limited appointments to vacancies caused by "reason of death or resignation during a recess." Because the phrase "during a recess" was so pointedly and specifically deployed in the Act, it precluded recess appointments for vacancies created prior to the recess in which an appointment was made. Also, the Act prevented a President from avoiding Senate confirmation by making sequential appointments running from one recess to the next. These provisions were then enforced by providing, "no money shall be paid from the treasury" to persons appointed contrary to the Act's provisions.[99]

At the start of modern times, the Senate again opposed the recess-appointment bypass of Senate confirmation, the occasion being President Franklin Roosevelt's previously mentioned threat of a recess appointment to the Supreme Court. In 1937 and while the Senate was in session, Justice Van Devanter resigned from the Supreme Court. Whereupon Roosevelt ran up this flag: He announced that his choice to fill that vacancy need

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97. CONG. GLOBE, 37th Cong., 3d Sess. 565 (1863).

98. Ch. 26, 12 Stat. 646 (1863).

99. 14 Stat. 430 (1867). The modern amendments to this Act are discussed *supra* at note 77. When the Tenure of Office Act was enacted, animosity between Congress and the President, Andrew Johnson, was in those post-Civil War days running high. The House had sent a bill of impeachment to the Senate saying that the President had acted unlawfully in firing the Secretary of War. The Tenure of Office Act provisions respecting recess appointments might, therefore, be dismissed as legislation colored by the heat of the moment. However, the recess-appointment issue had started earlier, dating from at least the Lincoln presidency. The Judiciary Committee Report, S. Rep. 80, which was much the basis of the congressional action in 1867, had been issued in 1863. Also, in 1863 and as stated above, Congress had acted to deny salary to recess appointees appointed to fill vacancies that existed while the Senate when the Senate was in session. Ch. 26, 12 Stat. 646 (1863).

not be submitted to the Senate. Rather, he might await the Senate's recess and then on his own motion place a new member of the Court. With the political and constitutional waters still roiled by Roosevelt's court-packing plan, the Senate was, shall we say, perturbed. And it doubted the President's power. As stated by Senator Burke, "If there is a vacancy on the Supreme Court . . . and it did not happen during a recess of the Senate, where would the President get any authority to make an appointment to fill the vacancy? I do not understand where the authority comes from at all."[100]

Senator Vandenberg then offered the resolution, the "sense of the Senate" was "that an appointment to the Supreme Court should be made only at such a time as the Senate may act upon confirmation prior to the entry of the nominee upon his service."[101] The ensuing debate was much the same as the debate that in 1863-67 had preceded the Tenure in Office Act. "For 150 years," Senator Vandenberg said, "there has been an argument as to what the word 'happen' means. . . . Does 'happen' mean 'occur', or does it mean 'exist'?" Once again, the Attorneys General Opinions were offered in support of the liberal reading. The opinion aired in the Senate, though, was that "When these precedents are studied, however, so much politics will be found . . . that one hesitates to accept the precedents in place of the plain, simple, unmistakable language of the Constitution."[102]

During this debate, a few Senators recalled the Tenure in Office Act as it provided that "no money shall be paid from the Treasury" to an unconfirmed appointee to a vacancy that had existed while the Senate was in session. They dryly noted that Roosevelt's proposed appointee should not expect to be paid.[103] In the end, FDR did not act on his threat of a recess appointment to the Supreme Court and the resolution was forgotten.

About a year after this debate in which the Tenure in Office Act and its no-pay provision had been remembered, the Attorney General recommended that the "prohibition" of the Act be lifted in certain situations.[104] These situations were where a vacancy arose within thirty days of the end of a session and where

100. 81 CONG. REC. 7999 (1937).
101. 81 CONG. REC. 7963 (1937).
102. 81 CONG. REC. 807 (1937).
103. 81 CONG. REC. 8103 (1937). A small mystery: By what authority were the Eisenhower appointees paid for their services prior to confirmation?
104. Compensation for Recess Appointees in Certain Cases, S. Rep. No. 1079, 76th Cong., 1st Sess. (1939).

an office is left unfilled because of the action or inaction of the Senate while it was in session. In 1940 amidst the start of World War II, the Act was quietly amended to include these recommendations. As modified, though, the nucleus of the Act (today codified under the title of "Recess Appointments") remains the same: "Payment for services may not be made to persons appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session."[105]

C. THE COURTS

The "celebrated" opinion on recess appointments was handed down in 1868, by Judge John Cadwalader in *The Case of the District Attorney of the United States.*[106] Notable then but overlooked today, this opinion nonetheless stands as the most thoughtful examination of the scope of the recess appointment clause. In this case, the Senate had adjourned without confirming the President's nominee as U.S. Attorney for the Eastern District of Pennsylvania. The President then appointed him anyway, as a recess appointee. The question before the court was whether that appointment was within the President's power; Cadwalader's decision was no, because the vacancy filled had been created prior to, and not during, the recess of the Senate.

Judge Cadwalader found that by their ordinary meaning, the terms of the clause limited presidential appointments to those that occurred during a recess of the Senate. But as he noted, this plain meaning had been disputed, on the grounds that public need would at times call for an office to be filled, regardless of when it became vacant. He further noted that the clause had therefore been interpreted as requiring that a vacancy need only "exist" during the recess in which an appointment was made. Cadwalader disagreed with this interpretation. He gave

105. With the added amendments, the Act is as follows:

> Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session .... This subsection does not apply
>
> (1) if the vacancy arose within 30 days before the end of the session of the Senate;
>
> (2) if, at the end of the session, a nomination for the office ... was pending before the Senate ..., or
>
> (3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session....

Ch, 580, 54 Stat. 751 (1940) (codified as amended at 28 U.S.C. § 5503).

106. 7 F. Cas. 731 (1868) (No. 3924).

due regard to such "exigencies" as might attend an unfilled office but found that these "occasional evils" did not justify a departure from the plain meaning of the text. "If it had been intended to give such amplitude of power to the president," Cadwalader wrote, "his authority to fill vacancies in office would not have been limited to those happening during a recess." Such "amplitude[s] of power," he stated, "had been extensively, debated, and then rejected, at the constitutional convention."[107]

But this conclusion based on text and principle did not end his opinion, because, as Cadwalader noted, "It is said that the question is not open." It was said not to be open because history had reconstructed the clause to permit appointments for vacancies created prior to a recess. Cadwalader disputed this historiography. If the construction had in fact been settled, he asked, why had its propriety been submitted to Attorneys General, time and again? As Cadwalader put it, "if the same question has been repeatedly stated anew, and renewals of the former opinions of attorney generals upon it have been obtained from their successors, this may indicate that no settled administrative usage had been understood to be established under the former opinions."[108]

Otherwise, seventy-five years ahead of Frankfurter's statement of the "gloss of history" theory of constitutional interpretation Judge Cadwalader understood what that theory had to entail. The history must include ingredients of acquiescence by another branch of government; without which a long-standing executive practice stands to be no more than an extended usurpation of power. As noted by Cadwalader, Congress and the Senate, by the Tenure of Office Act and other measures, had over the years opposed rather than ratified the executive practice.[109] Nor had the courts acquiesced. Before Cadwalader applied his hand, there had been no court decisions on point. Cadwalader explained:

> There has not been opportunity for judicial contestation: the existence of the power in question has not been legislatively recognized, has been denied by the senate, has been practically asserted by presidents only, and has not been exercised

107. *Id.* at 734-35.

108. *Id.* at 736-38.

109. Over the years, Congress had provided for recess appointments when it in a particular session it newly created positions that it could not fill during that session. *Id.* at 740-44.

> without constantly recurring suggestions of them of doubts of its existence under the constitution.[110]

Judge Cadwalader's opinion was then commended as "learned and exhaustive" and it was followed.[111] The one decision that did not then follow it, that of the northern district of Georgia in *In re Farrow,* noted Cadwalader's "learned and able" opinion.[112] Nonetheless, that court found that a recess appointment to a vacancy not created during a recess of the Senate was constitutional. Its constitutionality, the court said, was owed to "the practice of the executive department for nearly one hundred years, the acquiescence of the senate therein, and the recognition of this power by both houses of congress."[113] But that acquiescence, as Cadwalader had shown was not the case, so that while the court in *In re Farrow* may have praised the Cadwalader opinion it surely did not study it.

Nearly a century later when a court finally revisited the issue, that court, the Second Circuit in *United States v. Allocco,* relied on *In re Farrow* and overlooked the case law to the contrary.[114] The *Allocco* case involved an appointment to the bench to fill a vacancy created prior to the recess in which the appointment had been made. The argument against the appointment was that "in the plain language of the Constitution [recess appointments] may be used to only to fill vacancies, which "happen during the Recess of the Senate."[115] The court dismissed that argument, saying the "'the logic of words must yield to the logic of realities.'"[116] The realty the court noted was that selecting judges entails a long process. For vacancies occurring during a Senate session, that process cannot be "telescoped into whatever time remains in [the] session."[117] When the process of selection

110. *Id.* at 744. Cadwalader also relied on scholarly commentary, that of JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1559 at 355-56 (2d ed., 1851), and THOMAS SERGEANT, CONSTITUTIONAL LAW 373-74 (2d ed. 1830). Both treatises supported the literal reading, that the clause gave the President the power to make recess appointment for only those vacancies created during the recess in which the appointment is made.

111. Schenck v. Peay, 21 F. Cas. 672 (1869) (No.12,651) (relying on Story, *supra* note 110 at Sec. 1559, 355-56, for the proposition that the President "cannot appoint to such offices during the Recess of the senate because the vacancy does not happen during the recess of the senate"); *In re* Yancey, 28 F. 445 (W.D. Tenn. 1886).

112. 3 F. Cas. 112, 115 (N.D. Ga. 1880).

113. *Id.*

114. 305 F.2d 704 (2d Cir. 1962).

115. *Id.* at 710.

116. *Id.*

117. *Id.* at 712.

lasted into a recess, the court reasoned, the President should be able to make the appointment at that time or else "leave the office unfilled for the months until the Senate reconvenes." The reality the court did not consider is that recesses are no longer for months, as the court said, but for four or five weeks and in those few weeks intra- and intercircuit transfers can meet emergency staffing needs on the bench.

Otherwise, the court found that the "logic of words," that of the "during the recess" terms of the clause, had been enlarged by history. This history, as the court saw it, consisted of (a) the Attorneys General opinions liberally construing these terms and (b) a ratification of these opinions by the courts and Congress. In terms of ratification by the courts, the opinion in *Allocco* noted that the Attorneys General opinions had been "accepted as conclusive authority . . . in the single reported decision by a federal court on the question before us." This decision, the court said, was *In re Farrow.* [118] Overlooked were Judge Cadwalader's opinion and the cases that followed it. Respecting Congress, the court felt that the opposition of that body had been softened by the 1940 amendment to the Tenure of Office Act. That amendment showed that Congress had now determined that "The deterrent to abuse of power by Presidents conceived during the Civil War was . . . unnecessary and incongruous in an era when the President, without the advice and consent of Congress, may well have the power to control the destiny of mankind."[119]

The power to control the destiny of mankind is important. It does not follow though that Congress by its 1940 amendment to the Act altogether abandoned its opposition to recess appointments that do not conform to the terms of the clause. In that Act, the premise that "Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session" remains in place.

* * * * *

At the end of this long, twisting history—of attorney general opinions and congressional reactions and court cases—we return to the question with which we started: Have the "happen during

118. *Id.* at 715.
119. *Id.*

the Recess of the Senate" terms of the recess appointments clause been enlarged by history? Over time, one development has been that Senate recesses are now for a few weeks rather than the several months the clause anticipated. Thus, the problem addressed by the clause, leaving an important office unfilled over the months of a recess, is no longer pressing, which fact argues against enlarging the clause past its terms. Be that as it may, the question still remains whether wisely or not, the clause has over time been enlarged by a practice of appointments to fill vacancies that did not "happen during the Recess of the Senate." The weight of this history is debatable, though, because it doesn't clearly include the essential ingredient of ratification by the other branches of government.

For 135 years Congress has stated its opposition to this practice by means of the Tenure in Office Act. Perhaps, however, the 1940 amendment of the Act may be taken as a congressional ratification of a limited enlargement of the clause. The amendment provides that if "at the end of the session, a nomination for the office . . . was pending before the Senate" the President can go ahead and fill that office by a recess appointment. This enlargement, if valid, covers the recess appointments made by Presidents Clinton and Bush, which were for appointees nominated by the President and not voted on by the Senate.

Whatever the "nomination pending before the Senate" provision may amount to otherwise, it should be noted that the Tenure in Office Act and this exception to it pertains to *all* appointments. The federal courts are a special case, subject—as the Supreme Court reminds us in *Nguyen v. United States*[120]—to an overarching congressional plan of reserving seats on them to judges holding lifetime tenure under Article III. For the federal courts, Congress, in Title 28 of the United States Code, requires that district court and court of appeals judges "shall hold office during good behavior."[121] Recess appointees do not "hold office during good behavior." This noncompliance of recess appointments to Title 28 is offered simply to show that in the total scheme of congressional action, acquiescence by that body to any enlargement of the recess appointments clause that would place non-Article III judges in federal courts is a fact not easily established.

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120. 123 S. Ct. 2130 (2003).

121. 28 U.S.C. § 44(b) (2000) provides, "Circuit judges shall hold office during good behavior." 28 U.S.C. § 134(a) (2000) provides, "The district judges shall hold office during good behavior."

Moreover, congressional concessions, or claims of such concession, respecting the appointments power should not in any event be lightly accepted. As explained by the Supreme Court:

> The Appointments Clause . . . preserves . . . the Constitution's structural integrity by preventing the diffusion of the appointment power. . . . Neither Congress nor the Executive can agree to waive this structural protection. . . . The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.[122]

"Non-waiver" being the case, the courts should independently review any claim of congressional concession to see if fits the terms and purposes of the recess appointments clause.

Also, more is at stake here than waiver of senatorial prerogative. For recess appointments to the bench, enlargements of the appointments power operate in the face of individual right, that of a litigant to be heard by a judge free of political domination. In this personal rights context, Congress may be conceding that which does not belong to it. Not precisely on this point but nonetheless persuasive, Judge Norris in the *Woodley* case noted, "Our system affords each individual litigant the opportunity to vindicate his or her personal rights through the judicial process. The political branches cannot extinguish such rights by establishing 'adverse possession' through longstanding historical practice."[123] Finally, and no doubt this goes without saying, even if Presidents Clinton and Bush had the power the make appointments to vacancies created prior to the recess of the Senate, there remains the primary issue, whether that power is checked by the right to a judge free of political domination.

CONCLUSION

If the power to make recess appointments is defined according to the terms of the clause, which provide for appointments to fill only those vacancies that "happen during a recess of the Senate," then the modern practice of recess appointments to the bench will be ended. Today, these appointments are for vacancies created not during but prior to the recess in which they are

122. Freytag v. Commissioner, 501 U.S. 868, 878-80 (1991).

123. United States v. Woodley, 751 F.2d 1008, 1030-31 (9th Cir. 1985); *cf.* Clinton v. City of New York, 524 U.S. 417, 452 (1998) ("By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.").

made. If the power is not so limited, then for recess appointments to the bench a conflict between power and *right,* arises, the right being that of a litigant to be heard by a judge freed of political domination. Where an appointment to the bench is not justified in terms of the urgent public purpose upon which the recess appointment clause rests (and today, for appointments to the bench, no such urgency will likely exist), then in the conflict of power and right the right should prevail.

POSTSCRIPT

By letter of March 5, 2004, to the Eleventh Circuit Court of Appeals, Senator Edward Kennedy has particularly objected to the recess appointment of William Pryor to that court. The objection is that the appointment was not made during the recess between the sessions of the Senate but was instead made during an intrasession recess over the Presidents' Day holiday. In terms of the substantial principles at play in these appointments, this intrasession as opposed to an intersession objection seems a small point. Intersession and intrasession appointments alike breach a litigant's right to be heard be a judge free of political domination. Likewise, any one of the Clinton/Bush appointments are outside the ordinary sense and terms of the clause in that they were for vacancies that did not "happen during the Recess of the Senate."

But while it may be a relatively small point, the Kennedy letter does have a point. The recess appointments clause identifies the recess between two full sessions of the Senate, not a recess within a session. The manifest purpose for the clause is to allow for appointments during the predictably long recess between full sessions, when Senators would have dispersed out of the capital for months or so, beyond the reach of quick recall. This purpose is carried out by the terms of the clause. The clause refers to the singular, to "the Recess" and not to "recesses." Also, inasmuch as the clause refers to "all vacancies" that "happen during the Recess," surely the clause would similarly say "all recesses" if it included the indefinite number of breaks that may occur during a session. Finally, the clause provides that recess appointments "shall expire at the end of their next session." "Their next session" clearly refers to the next full session of the Senate; it would make no sense for an appointee's term to end within weeks at the Senate's first intrasession recess. By parallel construction, the "the Recess of the Senate" must also refer to a

full session of the Senate and mean a recess between two full sessions as opposed to an intrasession recess.[124]

This reading of the clause is, I know, inconsistent with various Attorneys General opinions.[125] But then these opinions are inconsistent with the terms of the clause, which fact was recognized in the first Attorney General Opinion on point, that of Philander Chase Knox in 1901. President Theodore Roosevelt had asked Knox whether he might properly make an appointment during a seventeen-day recess for Christmas. The opinion given was that this was not a "recess" within the meaning of the recess appointments clause, inasmuch as that clause provided only for "the period after the final adjournment of Congress for the session, and before the next session begins."[126] The subsequent opinions that approved intra-session appointments relied not on the ordinary meaning of the clause but rather versions of "the practical sense" of it. Attorney General Harry Daugherty in the first of these opinions stated, "the real question, as I view it, is whether in *a practical sense* the Senate is in session so that its advice and consent can be obtained."[127] In his opinion to the contrary, Attorney General Knox had not been blind to this "practical sense." However, an "argument from inconvenience," he said, "like the argument against a power because of its possible abuse, can not be admitted to obscure the true principles and distinctions ruling the point."[128]

124. See Memorandum from the Senate (July 1, 1993) (at S8545 & S8546) (on intrasession appointments).

125. 33 Op. Att'y Gen. 20 (1921) (Attorney General Daugherty). A more recent opinion to the same effect is that of the Office of Legal Counsel in 16 U.S. Op. OLC 15 (1993).

126. 23 Op. Att'y Gen. 599, 601 (1901). The question of intrasession appointments did not arise until the twentieth century and this opinion was the first to address the question.

127. 33 Op. Att'y Gen. at 21-22 (emphasis in the original).

128. 23 Op. Att'y Gen. at 603.

APPENDIX

SUPREME COURT RECESS APPOINTMENTS

Justice	Recess App't	Confirmation	Actions Heard Prior to Confirma-tion
Thomas Johnson	08/05/1791	11/07/1791	none
John Rutledge	07/01/1795	Nom. rejected, 12/15/1795	2
Bushrod Washington	09/29/1798	12/20/1798	none
Alfred Moore	10/20/1799	12/10/1799	none
Henry Livingston	11/10/1806	12/17/1806	none
Smith Thompson	09/01/1823	12/09/1823	none
John McKinley	11/08/1837	09/25/1837	none
Levi Woodbury	09/20/1845	01/03/1846	none
Benjamin Curtis	09/22/1851	12/20/1851	2
David Davis	10/17/1862	12/08/1862	none
John Marshall Harlan	03/29/1877	11/29/1877	none
Oliver Wendell Holmes, Jr.	08/11/1902	12/02/1902	none
Earl Warren	10/02/1953	03/01/1954	several
William Brennan	10/15/1956	03/19/1957	several
Potter Stewart	10/14/1958	05/05/1959	several