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A New Look at Recess Appointments to the Federal Judiciary – United States v. Alocco

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Comments / A New Look at Recess Appointments

to the Federal Judiciary—*United States v. Allocco*

THE PRESIDENT, UNDER THE CONSTITUTION, is empowered to grant temporary commissions to fill vacancies in certain offices,¹ the usual appointments to which would normally require the concurrent action of both the President and the Senate.² This power, operative only when the Senate is in recess,³ has been interpreted to encompass vacancies in the federal judiciary as well as vacancies in other offices. Therefore, the presidents through the years have indulged in the practice of appointing temporary judges whose commissions expire at the end of the ensuing session of Congress⁴ unless the Chief Executive submits the recess appointee's name to the Senate, which body is under no obligation to approve the nomination. This *modus operandi* has not been limited in scope to the so-called "inferior" federal judges, but has also been utilized in the appointment of Supreme Court Justices. Nor have the recess judges exhibited any inhibitions arising from the tenuousness of their commissions—they have participated in court activities to the extent of rendering decisions.

¹"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." U.S. CONST. art. II, sec. 2, cl. 3.

²"... and he [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, whose appointments are not herein otherwise provided for, and which shall be established by law..." U.S. CONST. art. II, sec. 2, cl. 2.

³The meaning of the term "recess" is discussed in 23 Ops. Att'y Gen. 599 (1901); 33 Ops. Att'y Gen. 20 (1921); 41 Ops. Att'y Gen., July 14, 1960.

⁴The usual commission of a federal judge reads that he is to "Have and to Hold the said office, with all powers, privileges and emoluments... *during his good behavior.*" 353 U.S. vii (1957). [Italics added.] But for a recess commission, the italicized portion is omitted and in its place is inserted "until the end of the next session of the Senate of the United States and no longer..." 352 U.S. x (1956).

In recent years, however, attention has been focused on the seeming contradiction between the recess appointment power as applied to the federal judiciary and the constitutional requirement that all federal judges be accorded "tenure during good behavior." Except for a brief skirmish in 1937,⁵ suggestions of such a conflict were rare and hardly vociferous, the subject gaining the status of a constitutional controversy and commending itself to serious discussion only during the Eisenhower administration. At that time, three recess appointees to the Supreme Court ascended the Bench and engaged extensively in Court deliberations before being confirmed by the Senate: Chief Justice Earl Warren, 1953; Justice William Brennan, 1956; and Justice Potter Stewart, 1958.⁶

At the outset, it should be pointed out that there are sound arguments to the effect that recess appointments to the federal judiciary are unconstitutional: a recess judge sitting before Senate confirmation is vulnerable to a number of contingencies antagonistic to the ideal of judicial independence⁷ as embodied in the Constitution; limited tenure replaces the constitutional specification of "tenure during good behavior,"⁸ in effect life tenure subject only to the extraordinary procedure of impeachment. In addition, when the Senate is considering the nomination of a recess appointee who has already participated in court decisions, it is somewhat hampered, if not completely so, in the exercise of its constitutional responsibility of "advice and consent." Recess appointments to the federal judiciary appear to be unnecessary: adequate machinery has been provided to vitiate the effects of vacancies in the lower federal courts; similar solutions can be devised in the case of Supreme Court vacancies within the framework of the Constitution, no amendment being required.

⁵ In 1937, the conjecture of the legislators being that President Roosevelt was awaiting the adjournment of Congress before filling a Supreme Court vacancy, Sen. Vandenberg (Mich.) introduced a resolution "that an appointment to the Supreme Court should be made only at such time as the Senate may act upon confirmation prior to the entry of the nominee upon his service." S. Res 163, 75th Cong., 1st Sess, 81 Cong. Rec. 7963 (1937). See the debates on the resolution, 81 Cong. Rec. 7992-8002 (1937). See also N.Y. Times, Aug. 3, 1937, p. 1, col. 5; N.Y. Times, Aug. 3, 1937, p. 2, col. 6; N.Y. Times, Aug. 4, 1937, p. 18, col. 5; note 64, *infra*.

⁶ See Table, *infra*.

⁷ Chief Justice John Marshall once expressed his views on what he considered to be a necessary judicial attribute:

"The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he [the judge] should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?" Quoted in *O'Donoghue v. United States*, 289 U.S. 516, 532 (1932).

See Burton, *An Independent Judiciary: The Keystone of Our Freedom*, 39 A.B.A.J. 1067 (1953); Pittman, *The Emancipated Judiciary in America: Its Colonial and Constitutional History*, 37 A.B.A.J. 485, 587 (1951).

⁸ "... The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, sec. 1.

The only judicial decision which has considered the question of the application of the recess appointment power to the judiciary, *in extenso*,⁹ is the recent case of *United States v. Allocco*.¹⁰ However, the court's treatment of the issue appears superficial in view of its importance and the attendant implications.

Allocco was found guilty of violating the federal narcotics laws and sentenced to imprisonment in a jury trial before Judge John M. Cashin, District Court Judge for the Southern District of New York. At the time of the trial, Judge Cashin was serving as an Eisenhower-appointed recess judge and had not yet received Senate confirmation. The defendant's conviction was affirmed;¹¹ certiorari was denied,¹² as was an application for rehearing.¹³ Allocco then submitted a motion to vacate under 28 USC §2255,¹⁴ asserting the deprivation of a constitutional trial arising from the alleged invalidity of the trial judge's commission; the motion was denied.¹⁵ On appeal, the petitioner urged (1) that Judge Cashin, a recess appointee, was not constitutionally empowered with judicial authority until confirmed by the Senate; (2) that the vacancy filled by the recess appointment of Judge Cashin occurred while the Senate was in session and therefore could not be constitutionally filled after Congress adjourned. The court determined that Judge Cashin was vested with judicial power and that his commission was free of defects.¹⁶

⁹ A similar question was raised in *Ex Parte Ward*, 173 U.S. 452 (1899), where the judge presided before Senate confirmation; but the Court disposed of the case on procedural grounds. In *Benner v. Porter*, 9 Howard 235 (1849), the respondent denied the jurisdiction of a lower court in a libel in admiralty suit. The Territory of Florida had been the location of a legislative territorial court, the judges of which were invested with a term of four years. When Florida was admitted to the Union, there was no immediate change made in the judge's tenure. The Court held that the judges appointed to the inferior federal court "must possess the constitutional tenure of office before they can become vested with any portion of the judicial power." *Id.* at 244. The Court continued:

There is no exception to this rule in the constitution. The territorial courts, therefore, were not courts in which the judicial power conferred by the constitution on the federal government could be deposited. They were incapable of receiving it, as the tenure of the incumbents was but four years. *Ibid.*

In the recent case *Glidden v. Zdanok*, 370 U.S. 530 (1961), Mr. Justice Douglas, dissenting, said that "... judges... who do not enjoy *constitutional* tenure and whose salaries are not *constitutionally* protected against diminution during their term of office cannot be Article III judges." *Id.* at 606. [Emphasis original.] A valid inference could conceivably be drawn from the above quotations, removed as they are from their context, that an Article III judge must be endowed with "tenure during good behavior" before being able to exercise judicial power.

¹⁰ 305 F. 2d 704 (2d Cir. 1962).

¹¹ 234 F. 2d 955 (2d Cir. 1956).

¹² 352 U.S. 931 (1957).

¹³ 352 U.S. 990 (1957).

¹⁴ "... If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. §2255 (1958).

¹⁵ 200 F. Supp. 868 (S.D.N.Y. 1961).

¹⁶ 305 F. 2d 704 (2d Cir. 1962).

1.

The Constitution, Art. II, Sec. 2, Cl. 2, requires that the President act in conjunction with the Senate in the appointment of Supreme Court Justices, diplomatic officials, and certain other officers of the United States.¹⁷ By historical usage, the same method of selection has been utilized for judges of the inferior courts.¹⁸ The following clause¹⁹ states that the President has the power, when the Senate is in recess, to fill all vacancies by granting temporary commissions, the word "all" apparently referring to the officers mentioned in the previous clause.²⁰ Allocco, however, contended that vacancies in all federal judgeships are an implied exception to the recess appointment power because a judge appointed under that provision is not endowed with "tenure during good behavior" as demanded by Art. III, Sec. 1.

The court attempted a rebuttal of this argument by referring to *The Federalist* No. 67,²¹ where Hamilton speaks of the recess power provision as relating "to the 'officers' described in the preceding one [clause—Art. II, Sec. 2, Cl. 2]." Its purpose was that of "establishing an auxiliary method of appointment, in cases to which the general method was inadequate." It should be noted, however, that Hamilton was concerned here with refuting arguments to the effect that the clause in question comprehended the power to fill vacancies in the Senate itself; he was not addressing himself to the issue of granting temporary commission to judges. The court then quoted from *The Federalist* No. 78, the topic of which is the Judiciary. Hamilton, speaking in reference to the method of appointing judges, said that it was "the same with that of appointing the officers of the Union in general. . . ." Apparently, the court overlooked the latter part of No. 78, where Hamilton expressly refers to the subject of judges serving under temporary appointments:

¹⁷ The Presidential appointing power evolved as the result of a series of political compromises in the Constitutional Convention. Divergent schools suggested selection by both Houses of the legislature, by the executive alone, by the Senate, and, finally, by the President with the "advice and consent" of the Senate. See SCHMIDHAUSER, *THE SUPREME COURT, ITS POLITICS, PERSONALITIES, AND PROCEDURES* 6-30 (1960); MORGANSTON, *THE APPOINTING AND REMOVAL POWER OF THE PRESIDENT 1-14*, S. Doc. No. 172, 70th Cong. 2d Sess. (1929); HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 17-35 (1953).

¹⁸ Harris, *op. cit. supra* note 17, at 376; Schmidhauser, *op. cit. supra* note 17, at 9.

¹⁹ See *supra* note 1. The recess appointment clause was suggested by Richard Dobbs Spaight (N.C.) on Sept. 7, 1787, ten days before the adjournment of the Constitutional Convention. His motion was immediately agreed to without debate, though such a clause had not theretofore been considered. See 2 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (rev. ed. 1937) 540, 574, 600, 660. Since the state constitutions of both North and South Carolina had similar provisions, the speculation is that the source of the recess appointment clause is either one of the two. See THORPE, *FEDERAL AND STATE CONSTITUTIONS AND ORGANIC LAWS (1492-1908)* (1909)—Vol. 5, *The Constitution of North Carolina 1776*, 2791-2, art. XIII, XIV, XX; Vol. 6, *The Constitution of South Carolina 1778*, 3244, 3254, 3255, art. V, XXVII, XXXI.

²⁰ See *supra* note 2.

²¹ The value of the *Federalist Papers* in ascertaining the intent of the framers of the Constitution is discussed in Pierson, *The Federalist Papers in the Supreme Court*, 33 *YALE L.J.* 728 (1924).

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*. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. [Emphasis added]²²

Allocco's interpretation of the Article III tenure requirement as preempting the recess appointment of a federal judge is cogent and sound, for it is that interpretation which gives effect to the constitutional ideal of judicial independence. That construction alone resolves the inconsistency between the two provisions, according them both vitality and emasculating neither. Allocco's view is also in keeping with the rule of constitutional construction that, every provision being an integral part of a logical whole, each part should be construed in the light of all the other parts.²³

The court however, expressed a conviction that if petitioner's argument were sustained and the recess appointment power confined in its application to those officers whose tenure is not fixed "during good behavior," there would inevitably result "a roadblock in the orderly functioning of the government. . . . Executive paralysis . . . violence to the orderly functioning of our complex government."²⁴ Such a surmise appears to be fraught with exaggeration. On the district and circuit court level, any "roadblock" would certainly be obviated by the application of the "interchange statutes"²⁵ which permit the temporary assignment of any inferior court judge to any district or circuit. District judges may be temporarily designated to circuit duty;²⁶ similarly may circuit judges temporarily assume district court duties.²⁷ Too, the retired members of the judiciary, District, Circuit, and Supreme Court alike, may, and frequently do, sit on circuit.²⁸ Consequently, there would seem to be no need for recess appointments in the district and circuit courts.²⁹

²² Hamilton elaborates further in No. 78 on the importance of the constitutional tenure for judges:

According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices *during good behavior*. . . . The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government . . . the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws . . . nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty. [Emphasis original]

²³ 1 Willoughby, *The Constitution of the United States* 65 (2d ed. 1929).

²⁴ U.S. v. Allocco, *supra* note 10, at 712.

²⁵ 28 U.S.C. §§291-92 (1958).

²⁶ 28 U.S.C. §292(a) (1958).

²⁷ 28 U.S.C. §291(c) (1958).

²⁸ 28 U.S.C. §294 (1958).

²⁹ The appointment of district court judges is virtually in the hands of local politics. HAYNES, *THE SELECTION AND TENURE OF JUDGES* 21-23 (1944). Such judges, according to the prevailing custom which has been well established since 1840, are actually selected by the senators from

A more critical, as well as interesting, aspect of the recess appointment provision, and perhaps one more difficult of solution, is encountered when that power is exercised in granting a recess commission to fill a vacancy on the Supreme Court. This is especially true when the Court would lack a quorum³⁰ without the participation of the recess appointee.

Of the eleven recess appointments to the Supreme Court before Chief Justice Warren, only three (Chief Justice John Rutledge and Justices Levi Woodbury and Benjamin Curtis)³¹ assumed their duties on the Court before being confirmed by the Senate.³² This is not to say that the other eight

the state in which the district is situated or the party organization of that state, depending upon whether or not the Senators are of the President's party. HARRIS, *op. cit. supra* note 17, at 314. Inevitably, such a practice results in political appointments, but this is not to say that the caliber of the appointments has been inferior. See *Id.* at 314-20. Irrespective of the defects inherent in the practice and the possible constitutional issues involved, this custom appears to be well-entrenched and will probably be with us for some time to come. See *The President Shall Nominate*, 33 ILL. L. REV. 809 (1938); Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 723, 870 (1929-30). Circuit court judgeships, on the other hand, are not subjected to such a custom. Therefore the President has greater latitude in the choice of circuit judge nominations. HARRIS, *op. cit. supra* note 17, at 314.

³⁰ The present quorum for the Supreme Court is six Justices. 28 U.S.C. §1 (1958). See 28 U.S.C. §2109 for the procedure to be followed when a quorum of the Justices is lacking. An interesting situation is to be found in the case of *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), a 4-2 decision, which was argued before the Court when Justice Brennan had not yet been confirmed. The decision was handed down after his confirmation, Justice Brennan writing the majority opinion. Without his participation in the decision, the Court would have lacked a quorum.

³¹ See Table, *infra*.

³² John Rutledge was the first recess appointee to the Supreme Court to sit before being confirmed by the Senate. (Rutledge had been an Associate Justice from 1789-91, but he never attended a session of the Court at that time; he served only on circuit. 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 56 [1937].) Appointed by President Washington as Chief Justice in July, 1795, he immediately assumed his judicial duties by taking his seat for the August term of 1795 and participating in two decisions, *Talbot v. Jansen*, 3 Dall. 133 (1795) and *United States v. Peters*, 3 Dall. 121 (1795). See 1 WARREN, *op. cit. supra* at 133-34; BARRY, *MR. RUTLEDGE OF SOUTH CAROLINA* 353 (1942); VAN SANTVOORD, *SKETCHES OF THE LIVES, TIMES, AND JUDICIAL SERVICES OF THE CHIEF JUSTICES OF THE SUPREME COURT* 206-09 (1882). When the Senate later convened and considered his nomination, Rutledge was rejected, according to most authorities, due to his vitriolic speech against the Jay Treaty after his recess appointment. 2 WRITINGS OF THOMAS JEFFERSON 44 (1896), Letter of Dec. 31, 1795 to Wm. Branch Giles. See also 1 WARREN, *op. cit. supra* at 139; BARRY, *op. cit. supra* at 357. Despite the public furor occasioned by Rutledge's speech, no question was raised as to the Chief Justice's legal status as a judge or his power to act. In a footnote in *Ex Parte Ward*, 173 U.S. 452, 454-55 (1889), the Court Reporter notes that Rutledge must have been considered one of the Chief Justices because a bust of him is to be found in the Supreme Court chamber in the U.S. Capitol along with the busts of the other Chief Justices. The reader will perhaps find it of interest (recalling that the Chief Justices in chronological order, were Jay, Rutledge, Ellsworth, and Marshall) that the busts were put up in order of Jay (4 Stat. 474—1831); Ellsworth (4 Stat. 717—1834); Marshall (5 Stat. 25—1836). Not until 1856 was a bust of Rutledge considered. See S. Rep. No. 205, 34th Cong., 1st Sess. (1856). See also 10 RICHARDSON, *COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897* 616 (1899) where John Rutledge was omitted from the list of Chief Justices. Evidently, there has been some speculation that Rutledge should not be considered a Chief Justice.

The circumstances surrounding the recess appointment of Benjamin Curtis to the Supreme

doubted their right to do so; some of the recess appointees could not have taken part in Supreme Court business, whatever their predilection, their appointments being so dated that the Senate convened and confirmed their nomination in advance of the next Court term.³³ It should also be noted that within twenty years after the ratification of the Constitution, there had been five recess appointments to the Supreme Court.³⁴ It is not unreasonable to assume that a number of the delegates to the Constitutional Convention were still alive and active. Yet, apparently no objection was raised to this practice. Perhaps only an injured party could raise the question;³⁵ or conceivably the Court's minor role occasioned no concern as to the composition of its membership. An indication of the early judicial attitude toward recess appointments to the Supreme Court may be illustrated by the words of Justice James Iredell, a member of the Court at the time, on the occasion of the resignation of Chief Justice John Jay from the Court:

The President may, himself, make a temporary appointment, but it is not much to be expected, I fear, as few gentlemen would accept under the circumstances.³⁶

Since the letter does not reveal Iredell's meaning of the word "circumstances," one may theorize that he was referring to the tenuousness of a recess appointee's position, the political atmosphere of the times, or both.

Almost eighty-five years later, commenting upon his father's recess appointment to the Supreme Court and assumption of duties before Senate confirmation, the scion of Benjamin Curtis wrote:

Court are noteworthy. Allotted a circuit before Senate confirmation, Curtis heard a case involving the Fugitive Slave laws, *United States v. Morris*, 26 Fed. Cas. 1323 (No. 15815) (C.C.D. Mass. 1851). His decision infuriated the growing abolitionist sentiment and resulted in a widespread tumult. See 2 WARREN, *op cit. supra* at 228-29. Yet there appears to be no evidence that anyone contested the legality of Curtis' adjudicating judicial matters prior to the Senate's giving their "advice and consent." Many years later, at a meeting of the bar of the circuit court of Boston following the death of Curtis, the following remark was made:

I knew he would conduct the trial with impartiality. What I now wish to say is, that I felt then, and I have felt ever since, that there was, on his part, as affirmative determination that the trial should be had with absolute fairness. At a critical stage of one case, he volunteered a suggestion in favor of the accused, as to the weight of the testimony, which, I think, in the measuring cast, secured the verdict of acquittal.

And they who remember how things stood at Washington in those days will see the force of suggestion that Judge Curtis had not been confirmed by the Senate, but was acting upon an executive appointment made during the recess of the Senate. Statement made by Richard H. Dana and quoted in 1 CURTIS, *MEMOIR OF BENJAMIN ROBBINS CURTIS* 163 (1879).

The potential complications inherent in Curtis' recess appointment are a vivid illustration of the impropriety of the practice.

³³ Similar in this respect were the recess appointments of Justices Thomas Johnson (the first recess appointee to the Court), Bushrod Washington, Alfred Moore, Henry Livingston, and Smith Thompson. See *Supreme Court Minutes—National Archives*.

³⁴ See Table, *infra*.

³⁵ See *Glidden v. Zdanok*, *supra* note 9, at 535-37; *Ex Parte Levitt* 302 U.S. 633 (1937).

³⁶ 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 447-48 (1857), letter of July 2, 1795.

RECESS APPOINTMENTS TO THE SUPREME COURT

NAME	I. DATE OF APPOINTMENT	II. DATE CONGRESS CONVENED	III. DATE OF SENATE ACTION	IV. DATE JUSTICE ASSUMED DUTIES
1. THOMAS JOHNSON	<i>Aug. 5, 1791 a</i> Nov. 7, 1791	Oct. 24, 1791	<i>Nov. 1, 1791</i> Nov. 7, 1791	<i>Aug. 6, 1792 x</i> Aug. 6, 1792
2. JOHN RUTLEDGE	<i>July 1, 1795 b</i> July 1, 1795	Dec. 7, 1795	<i>Dec. 10, 1795</i> Dec. 15, 1795 (REJECTED)	<i>Aug. 12, 1795</i> Aug. 12, 1795
3. BUSHROD WASHINGTON	<i>Sept. 29, 1798</i> Dec. 20, 1798	Dec. 3, 1798	<i>Dec. 19, 1798</i> Dec. 20, 1798	<i>Feb. 4, 1799 (c)</i> Feb. 4, 1799
4. ALFRED MOORE	<i>Oct. 20, 1799</i> Dec. 10, 1799	Dec. 2, 1799	<i>Dec. 5, 1799</i> Dec. 20, 1799	<i>Aug. 9, 1800 (c)</i> Aug. 9, 1800
5. HENRY B. LIVINGSTON	<i>Nov. 10, 1806</i> Nov. 10, 1806	Dec. 1, 1806	<i>Dec. 15, 1806</i> Dec. 17, 1806	<i>Jan. 20, 1807</i> Feb. 2, 1807
6. SMITH THOMPSON	<i>Sept. 1, 1823</i> Dec. 9, 1823	Dec. 1, 1823	<i>Dec. 8, 1823</i> Dec. 9, 1823	<i>Sept. 1, 1823</i> Feb. 10, 1824
7. JOHN McKINLEY	<i>Apr. 22, 1837</i> Sept. 25, 1837	Sept. 4, 1837	<i>Sept. 19, 1837</i> Sept. 25, 1837	<i>Jan. 9, 1838 (c)</i> Jan. 9, 1838
8. LEVI WOODBURY	<i>Sept. 20, 1845</i> Sept. 20, 1845	Dec. 1, 1845	<i>Dec. 23, 1845</i> Jan. 3, 1846	<i>Sept. 23, 1845</i> Dec. 2, 1845
9. BENJAMIN CURTIS	<i>Sept. 22, 1851 c</i> Dec. 20, 1851	Dec. 1, 1851	<i>Dec. 12, 1851</i> Dec. 20, 1851	<i>Oct. 10, 1851 y</i> Dec. 1, 1851
10. DAVID DAVIS	<i>Oct. 17, 1862</i> Dec. 8, 1862	Dec. 1, 1862	<i>Dec. 3, 1862</i> Dec. 8, 1862	<i>Dec. 10, 1862</i> Dec. 10, 1862
11. OLIVER WENDELL HOLMES	<i>Aug. 11, 1902 d</i> Dec. 4, 1902	Dec. 1, 1902	<i>Dec. 2, 1902</i> Dec. 4, 1902	<i>Dec. 8, 1902</i> Dec. 8, 1902
12. EARL WARREN	<i>Oct. 2, 1953</i> Oct. 2, 1953	Jan. 6, 1954	<i>Jan 11, 1954</i> Mar. 1, 1954	<i>Oct. 5, 1953</i> Oct. 5, 1953
13. WILLIAM J. BRENNAN	<i>Oct. 15, 1956</i> Oct. 15, 1956	Jan. 3, 1957	<i>Jan 14, 1957</i> Mar. 19, 1957	<i>Oct. 16, 1956</i> Oct. 16, 1956
14. POTTER STEWART	<i>Oct. 14, 1958</i> Oct. 14, 1958	Jan. 7, 1959	<i>Jan. 17, 1959</i> May 5, 1959	<i>Oct. 14, 1958</i> Oct. 14, 1958

I Italicized dates are actual dates of appointment—taken from CARSON, *THE SUPREME COURT OF THE UNITED STATES* (1891) and 2 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 757-763 (1937), except for Justices Warren, Brennan, and Stewart, where the data were obtained from 346, 352, and 358 U.S. Reports.

a—DELAFLAINE, *LIFE OF THOMAS JOHNSON* 476 (1927).

b—BARRY, *MR. RUTLEDGE OF SOUTH CAROLINA* 353 (1942).

c—I CURTIS, *MEMOIR OF BENJAMIN ROBBINS CURTIS* 156 (1879).

d—Vol. Mar. 4, 1901—, *Register of Recess Appointments (1857-1912)*, Records of the White House Office (National Archives), p. 155. (Several volumes of the Register are missing, e.g., the Register for 1862. Consequently, this writer was unable to ascertain whether Justice David Davis was listed as a recess appointee.) N.B. Attention is called to the fact that 2 Warren, *op. cit. supra* at 761 lists the appointment date of Justice John Marshall Harlan as Mar. 29, 1877, which would qualify Justice Harlan as a recess appointee. However, upon examination of the Vol. Mar. 4, 1877- of the Register, *supra*, Justice Harlan's name was not present. His date of appointment in 8 *DICTIONARY OF AMERICAN BIOGRAPHY* 270 is listed as Oct. 17, 1877, two days after the convening of the 45th Congress, 1st Sess., on Oct. 15, 1877. Justice Harlan's "Letters Patent" bears the date Nov. 29, 1877 (microfilms of the Minutes of the Supreme Court—National Archives). A complete examination of the New York Times for the weeks preceding and following the date given by Mr. Warren revealed no mention of Justice Harlan's appointment. However, the N.Y. Times, Oct. 11, 1877, p. 1, col. 3 spoke of Justice Harlan's approaching appointment to the Supreme Court. The N.Y. Times, Oct. 18, 1877, p. 1, col. 5 mentions that Justice Harlan's nomination was sent to the Senate on Oct. 17.

Roman-type are dates of commission, "Letters Patent"—taken from microfilms of the Supreme Court Minutes (National Archives) and material compiled by the Marshal, U.S. Supreme Court. Dates for Justices Warren, Brennan, and Stewart are taken from U.S. Reports, *supra*.

II Congressional Directory, 87th Cong., 2d Sess., 321-27 (Jan., 1962).

III Taken from the Journal of the Executive Proceedings of the Senate. Italicized dates indicate the day the Senate received the nomination from the President. Roman-type dates indicate the day of senatorial confirmation (or rejection, as in the case of John Rutledge).

IV Italicized dates indicate date of judicial oath. Source is material compiled by the Marshal, U.S. Supreme Court. Small-letter reference (c) is taken from the Marshal's code indicating "authority that is questionable."

The Judiciary Act of 1789, 1 Stat. 76 provided that until the oath of office is taken, the justice is not vested with the prerogatives of his office. "... the justices of the Supreme Court, and the district judges, before they proceed to execute the duties of their respective offices, shall take the following oath. . . ."

28 U.S.C. 453—"Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office. . . ." June 25, 1948, c. 646, 62 Stat. 907.

x—taken from DELAFLAINE, *op. cit. supra* note 1a at 480. This date is probably inaccurate. Justice Johnson heard the arguments for *Ware, adm. of Jones, v. Hylton*, 1 Curtis 164, on Nov. 24, 1791, while sitting on the Circuit Court bench at Richmond, Va. DELAFLAINE, *op. cit. supra* at 476. It would not be incorrect, therefore, to assume that he had taken his judicial oath prior to Aug. 6, 1792.

y—taken from 1 CURTIS, *op. cit. supra* note 1 c, at 156. Curtis presided as Circuit Court judge for the 1st Circuit from Oct. 15, 1851. 1 CURTIS, *op. cit. supra*, at 157.

Roman-type dates indicate when the justice assumed his duties. Taken from Supreme Court Minutes, *supra*, except for material on Justices Warren, Brennan, and Stewart which were taken from U.S. Reports, *supra*.

As the appointment had been made in the recess of the Senate, it could subsist only until the next session of that body, unless it should be confirmed before the expiration of that session. But in the meantime the judge had full authority to act.³⁷

Oliver Wendell Holmes, when extended a recess appointment at the turn of the century, decided to await Senate action before donning his robes. When asked by a news reporter when he would resign his present position [Massachusetts state judge] to assume his duties on the Supreme Court, Holmes answered:

Hardly before the Senate approves the President's nomination. It must be confirmed by the Senate you know.³⁸

Whether or not this indicates Holmes' attitude toward recess appointments to the Court is not clear—perhaps he desired the security of Senate confirmation before leaving one position to accept another. Nonetheless, except for a resolution introduced in the Senate in 1937,³⁹ the practice of granting recess commissions to the Supreme Court appears to have remained virtually uncontested but for the arguments raised in the past ten years.

When Chief Justice Earl Warren ascended the Bench by virtue of a recess appointment in 1953 prior to confirmation, misgivings were expressed concerning this practice.⁴⁰ Certain of the academic world asserted that Warren's participation in Court activities would necessarily weaken the spirit of judicial independence because his deliberations before confirmation would evoke particular scrutiny by the Senate⁴¹—the Justice sits “with one eye over his shoulder on Congress.”⁴² Justice William Brennan was accorded a recess appointment three years later, in October, 1956, a Presidential election year. Concern was expressed as to the effect of his deliberations in the event that a newly-elected President withdrew his name or if he failed of Senate approval.⁴³ In 1958, President Eisenhower proffered his third recess appointment to the Supreme Court to Potter Stewart who also sat before confirmation.⁴⁴ The controversy over recess appointments was intensified by Justice Stewart's participation in *Frank v. Maryland*,⁴⁵ a 5-4 decision criticized by

³⁷ CURTIS, MEMOIR OF BENJAMIN ROBBINS CURTIS 157 (1879).

³⁸ N.Y. Times, Aug. 12, 1902, p. 1, col. 7. See also 1 HOLMES-POLLACK LETTERS 103-108 (1941).

³⁹ See *supra* note 5.

⁴⁰ See N.Y. Times, Nov. 9, 1953, p. 19, col. 1.

⁴¹ Harvard Law School Record, Oct. 8, 1953, p. 1, col. 3; *Id.*, *Recess Appointments*, p. 2, col. 1.

⁴² *Id.* at p. 1, col. 3.

⁴³ N.Y. Times, Oct. 2, 1956, p. 34, col. 5.

⁴⁴ See Thompson, *Mr. Justice Stewart Serves on Approval*, *The Reporter*, 31 (Feb. 5, 1959).

⁴⁵ 359 U.S. 360 (1959).

some as greatly diluting the homeowner's right of privacy.⁴⁶ Justice Stewart's concurring vote produced the majority. His subsequent confirmation was said to have removed any "cloud" which had attached to the decision. Two Senators, however, voted not to confirm, one of their reasons being that Justice Stewart was not constitutionally empowered to sit until Senate approval.⁴⁷ Within a few months, the Senate passed a resolution expressing the sense of the Senate that recess appointments to the Supreme Court should not be made except under extraordinary circumstances:

[Resolved] 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 interests 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 or ending a demonstrable breakdown in the administration of the Court's business.⁴⁸

The resolution did not deny the existence of the power, Senator Hart (Mich.), the originator of the resolution, having remarked that "... if ever there was a question for debate . . . time long since has resolved it."⁴⁹ Nonetheless, there were comments that a constitutional issue on the matter does exist.⁵⁰ It is debatable whether "occasional practice backed by mere assumption [can] settle a basic question of constitutional principle."⁵¹

Because a recess judge holds his position only until the end of the next session of Congress unless his nomination is submitted to the Senate and subsequently approved by it, an ostensible disparity exists between such limited tenure and the provisions of Art. III. Reconciling the two clauses is possible either by permitting an exception to the "tenure during good behavior" requirement in the case of a recess judge, or viewing Art. III judges as an exception to the recess appointment power. The former interpretation is felt to be untenable and represents a compromise of the basic constitutional attribute of a federal judge—complete independence from all forces and pressures inimical to objective justice. A recess appointee to the Supreme Court who

⁴⁶ See Krock, *Judicial Appointments in the Absence of the Senate*, N.Y. Times, May 7, 1959, p. 32, col. 5.

⁴⁷ Sen. Exec. Rep. No. 2, 86th Cong., 1st Sess. (1959). See N.Y. Times, Apr. 20, 1959, p. 13, col. 4; N.Y. Times, Apr. 30, 1959, p. 25, col. 6.

⁴⁸ Sen. Res. No. 334, 106 Cong. Rec. 18145 (1960). See also 106 Cong. Rec. 18130-45 (1960); Sen. Rep. No. 1893, 86th Cong., 2nd Sess. (1960).

⁴⁹ 106 Cong. Rec. 18131 (1960).

⁵⁰ See remarks of Sen. Sam Ervin (N.C.), 106 Cong. Rec. 18142-43 (1960).

⁵¹ Letter of Prof. Henry M. Hart, Jr., Harvard Law School Record, Oct. 8, 1953, p. 2, col. 2. See Lewis, *U.S. Recess Posts on Bench Scored*, N.Y. Times, Sept. 23, 1957, p. 17, col. 3.

assumes his duties before Senate confirmation is vulnerable to a number of contingencies repugnant to that ideal.

The possessor of a temporary judicial commission holds his position at the pleasure of the President who may remove him at any time. If the President sees fit to submit the recess appointee's name to the Senate, that body may reject the nomination outright, or terminate its existence by failing to act on it by adjournment. The recess appointee's judicial deliberations on controversial issues will almost inevitably be subjected to close scrutiny and made factors for consideration both by the President and the Senate. Consequently, he may be tempted to hand down opinions calculated to appease certain groups or parties; or, perhaps, fearful of their political effects, he will temporize and put aside the determination of controversial issues until after confirmation, thus insuring himself against reprisals. Indeed, there has been speculation that the delay in the handing down of certain Supreme Court decisions⁵² was motivated by the desire to immunize the recess appointees involved, who had yet to face confirmation, from possible repercussions.⁵³

When a recess appointee takes part in decisions prior to Senate confirmation, he succeeds in erecting a Fifth-Amendment-type wall around subject matter pertinent to the Senate's consideration, thus frustrating the Senate in the execution of its duty of "advice and consent."

The Senate cannot be a free agent in the premises if the appointee has taken his seat, taken the oath, and clothed himself with the robes of office.⁵⁴

That the Supreme Court has played an ever-increasing role in passing upon economic and social issues in recent years is apparent.⁵⁵ Influenced by this trend, the presidents have placed greater stress on the "ideological attitudes"⁵⁶ of the nominees to the Court. The Senate has also taken cognizance of the Court's preoccupation with policy issues and thus has given primary attention

⁵² *Brown v. Board of Education*, 347 U.S. 483 (1954); *Jencks v. United States*, 353 U.S. 657 (1957); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). "... it is likely that Earl Warren's influence was great in producing the finding that insured unanimity." *N.Y. Times*, May 18, 1954, p. 28, col. 5.

⁵³ See *Recess Appointments to the Supreme Court—Constitutional But Unwise*, 10 *STAN. L. REV.* 124, 140-42 (1957). The entirety of the Stanford article should be considered obligatory reading for those interested in the problems of recess appointments to the Supreme Court. The same may be said for Staff of House Comm. on the Judiciary, 86th Cong., 1st Sess., *Recess Appointments of Federal Judges* (Comm. Print 1959).

⁵⁴ Remark of Sen. Vandenburg. *N.Y. Times*, Aug. 3, 1937, p. 1, col. 5.

⁵⁵ "Inevitably, the future statistics of the Court's work will show a continuing growth in the volume of business dealing with control over economic enterprise and kindred public controversies, and a still more striking decrease in ordinary private litigation." FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* 303 (1928). See also Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 *U. PA. L. REV.* 781, 792-93 (1957); Miller, *The Changing Role of the United States Supreme Court*, 25 *MOD. L. REV.* 641 (1962).

⁵⁶ SCHMIDHAUSER, *op. cit. supra* note 17, at 12.

to the philosophy, attitudes, and outlook of the nominees on these issues and far less concern to partisan considerations.⁵⁷ To illustrate, the clashes that have occurred in the past fifty years over nominations to the Supreme Court have been concerned almost wholly with such economic and social issues, though not always openly so.⁵⁸ The situation is such, however, that when a recess appointee engages in Court decisions before confirmation, the Senate is unable to adequately appraise itself of the ideology of the nominee. Consider the remarks of Justice Brennan, who had already been sitting on the Court four months, in response to a question during the hearings on his nomination:

But I am in the position of having an oath of my own by which I have to guide my conduct and that oath obligates me not to discuss any matter presently pending before the Court, because I have actually sat in consideration on such matters and the only way that the mouth of a member of the Court may be opened in expression of an opinion in respect of any one of them is a formal written opinion when that is finally written and filed.⁵⁹

If the Senate confirms the nomination of the recess appointee, the overtones are that the Senate has expressed its concurrence with the decisions rendered by the recess Justice prior to confirmation. If the Senate rejects the nomination, allegations will be made that the Senate is attempting to control the determinations of the judiciary. It would appear that in order to safeguard the Senate's proper fulfillment of its function in the appointing process, the practice of granting recess commissions to Supreme Court nominees should be considered an unconstitutional aggrandizement of Presidential power. Only in this way will all the inherent complications be resolved.

As an important sidelight which is not within the scope of this comment, the reader should seriously consider the jural status of a recess judge. Is such

⁵⁷ HARRIS, *op. cit. supra* note 17, at 303, 313. The custom of holding public hearings on judicial nomination was inaugurated in 1916, when the nomination of Louis Brandeis was sent to the Senate. Cole, *Role of the Senate in the Confirmation of Judicial Nominations*, 28 *Am. Pol. Sci. Rev.* 875, 877 n. 8 (1934). It was unusual, until recently, for nominees to the Supreme Court to be invited to appear before the Judiciary Committee. HARRIS, *op. cit. supra* note 17, at 245. Harlan Stone, in 1925, was the first Supreme Court nominee to come before the Committee to be examined. Frank, *Appointment of Supreme Court Justices: Prestige, Principles and Politics*, *Wisc. L. Rev.* 460, 492 (1941). All the New Deal appointees to the Court from Sen. Black to Atty. Gen. Murphy were present at their committee hearings and were available for examination had any Senator cared to ask a question. *Id.* at 492, n. 111. When Felix Frankfurter, the only New Deal appointee actively examined, was asked to testify, he stated that he felt the "personal participation of the nominee would not be of assistance to the committee or in the best interests of the Court, and declined to express his personal views on any controversial political issues affecting the Court." HARRIS, *op. cit. supra* note 17, at 246.

⁵⁸ HARRIS, *op. cit. supra* note 17, at 313. One writer has referred to these clashes as the "sur-reptitious introduction of political questions under the guise of character objections." Cole, *op. cit. supra* note 57, at 892.

⁵⁹ *Hearings Before the Committee of the Judiciary of the United States Senate on the Nomination of William Joseph Brennan*, 85th Cong., 1st Sess. at 18 (1957).

a recess appointee a *de jure* or *de facto* judge—or an interloper?⁶⁰ Is the minimum requirement for any *de facto* officer that his authority emanate from a source which has a legal right to bestow such authority? Or would the fact that the recess appointee ascended the Bench under color of authority and public acquiescence be sufficient to confer *de facto* or *de jure* status?⁶¹ What would be the effect of his decisions—valid, voidable, or void? Would public policy be so compelling that all his decisions would be considered valid for that reason alone?

Probably the most forceful criticism that will be levelled against the interpretation of the recess appointment clause advocated in this comment—that its application should be limited to those officers whose tenure is not fixed “during good behavior”—is that it will severely hamper the work of the Supreme Court. It is argued that keeping the Court at full strength is of primary importance in preventing deadlocks on important cases and insuring the maximum efficiency in the administration of justice in the Nation's highest tribunal. Suffice it to say that the present system, even utilizing recess appointees, does not insure the ideal of a full Court. Consider the incapacitation of a Justice by illness, or his self-imposed disqualification for some reason or other.

Undoubtedly, however, a scheme could be devised which would both insure the Court's working at full capacity at all times and obviate any need for recess appointments. Whenever necessary to insure a full Bench, or at least a quorum, the Chief Justice could be authorized by Congress to recall, temporarily, retired Supreme Court Justices, perhaps in order of inferiority. When retired Justices are not available, he could be permitted to call the Chief Judges of the eleven circuits in numerical order, the first such Chief Judge called not to sit again until the Chief Judges of all the other circuits have sat. Each of these “substitutes” already possessing the tenure required under Art. III, no constitutional question could be raised. The “substitute Justice,” sitting until a nomination were tendered to and confirmed by the Senate, would contribute as much stability and continuity to the Court, if not more so, as a recess appointee who always faces the possibility of Presidential withdrawal or Senate rejection. A “substitute Justice” system is superior in several ways to the practice of recess appointments. A circuit Chief Judge could be called to sit when a Justice was ill or disqualified; a recess appointment could not be made for that situation, for there is no “vacancy” to fill. The Circuit Judges, being already familiar with the scope of Federal law and procedure, would more easily adapt themselves to Supreme Court duties and contribute much more in less time than a recess appointee, who might not

⁶⁰ See *Norton v. Shelby County*, 118 U.S. 425, 441-49 (1886) for a detailed analysis of the *de facto* doctrine. See also *U.S. v. Royer*, 268 U.S. 394, 397-98 (1924).

⁶¹ *Gould v. United States*, 19 Ct. Cl. 593 (1884); *McDowell v. United States*, 159 U.S. 596, 602 (1895). See also Note, 45 VA. L. REV. 1391 (1959) on *Leary v. United States*, 268 F. 2d 623 (9th Cir. 1959).

even have practiced law before. Whatever solutions are contrived,⁸² they will all have some merit so long as the practice of granting temporary commissions to judges is relegated to the realm of History.

2.

Another interesting argument was raised by the petitioner in the *Allocco* case in reference to the recess appointment provision. *Allocco* contended that the words "may happen" in that clause should be construed to mean "may occur" in contradistinction to the accepted construction "may exist." The prior incumbent (of the vacancy filled by the recess appointment of Judge Cashin) having resigned two days before the Senate adjourned, it would then logically follow that the President could not appoint a successor during the recess of Congress—the vacancy did not "occur" during the recess.

Recalling this writer's contention that the recess power clause does not encompass the federal judiciary, the reader will necessarily conclude that any discussion concerning the interpretation of that provision is rendered immaterial. However, the following discourse will be presented in the hope that it will stimulate consideration of the problem and perhaps result in a solution.

The interpretation of those seemingly ambiguous words "may happen" appears settled by a long and almost-unanimous line of opinions of the Attorneys General in favor of the "exist" construction.⁸³ Such construction has

⁸² See N.Y. Times Feb. 25, 1958, p. 20, col. 6.

⁸³ 1 Ops. Att'y Gen. 631 (1823); 2 Ops. Att'y Gen. 525 (1832); 3 Ops. Att'y Gen. 673 (1841); 4 Ops. Att'y Gen. 523 (1846); 6 Ops. Att'y Gen. 358 (1854); 7 Ops. Att'y Gen. 186 (1855); 100 Ops. Att'y Gen. 356 (1862); 11 Ops. Att'y Gen. 179 (1865); 12 Ops. Att'y Gen. 32 (1866); 12 Ops. Att'y Gen. 449, 455, 469 (1868); 14 Ops. Att'y Gen. 562 (1875); 15 Ops. Att'y Gen. 207 (1877); 16 Ops. Att'y Gen. 522, 538 (1880); 17 Ops. Att'y Gen. 521 (1883); 18 Ops. Att'y Gen. 29 (1884); 19 Ops. Att'y Gen. 261 (1889); 25 Ops. Att'y Gen. 258 (1904); 26 Ops. Att'y Gen. 234 (1907); 30 Ops. Att'y Gen. 314 (1914); 33 Ops. Att'y Gen. 20 (1921); 41 Ops. Att'y Gen., July 14, 1960; 81 Cong. Rec. 8101-8104 (1937).

See generally, 67 Congressional Record 262-64 (1925)—a useful summary of the more important opinions of the Attorneys General on point. See also 2 Ops. Att'y Gen. 333, 336 (1830); 3 Ops. Att'y Gen. 188 (1837); 4 Ops. Att'y Gen. 30 (1842); 4 Ops. Att'y Gen. 248 (1843); 6 Ops. Att'y Gen. 1 (1853); 10 Ops. Att'y Gen. 449 (1863); 12 Ops. Att'y Gen. 304 (1867); 13 Ops. Att'y Gen. 516 (1871); 15 Ops. Att'y Gen. 3, 375 (1877); 15 Ops. Att'y Gen. 449, 458 (1878); 16 Ops. Att'y Gen. 596 (1880); 17 Ops. Att'y Gen. 522, 530, 532 (1883); 18 Ops. Att'y Gen. 98 (1885); 23 Ops. Att'y Gen. 599 (1901); 32 Ops. Att'y Gen. 271 (1920); Sen. Rep. 4389, 58th Cong., 3d Sess. (1905); 39 Cong. Rec. 3823-3824 (1905).

(N.B. Attorney General Mason in 4 Ops. Att'y Gen. 361 [1845] held that vacancies known to exist during the session of Congress couldn't be filled in the recess; but in a more elaborate opinion written in 1846 [4 Ops. Att'y Gen. 523] he apparently expresses general concurrence with his predecessors.) See also N.Y. Times, July 29, 1937, p. 18, col. 5.

Attorney General Cummings rendered an informal opinion to President Roosevelt deciding that the President might delay naming a successor to Justice Van Devanter until after Congress adjourned if he so desired. See note 5, *infra*; note 64 *infra*; N.Y. Times, July 31, 1937, p. 4, col. 5; N.Y. Times, Aug. 3, 1937, p. 2, col. 2. So far as this writer is able to ascertain, the opinion was not published.

See also 81 Cong. Rec. 8104 (1937) where Attorney General Cummings's opinion or memorandum was described as of a "confidential nature."

been sanctioned by executive precedent;⁶⁴ and Congress has apparently committed itself to the "exist" school, although it had attempted to emasculate the power, without denying its existence, by subjecting the recess appointee to a vacancy which occurred during the Congressional session to somewhat onerous conditions—no salary.⁶⁵

The scant judicial authority⁶⁶ on the subject is, for the most part, in accord with the determination of the Attorneys General that the term "may happen" comprehends all vacancies, irrespective of the time when, or manner in which, the vacancy occurred. The recess appointment power of the President has thus been extended by interpretation and historical usage to apply even to a vacancy *actually arising* while Congress is in session, which vacancy remained unfilled after adjournment, either because the Senate rejected the nominee outright, or was not given a nomination upon which to act, or having received a nomination failed to act. Nor was it of any consequence that the vacancy arose by the legislative enactment of a new office. The rationale underlying the majority interpretation may be cogently summarized in the words of one of the Attorneys General:

... it is of the very essence of executive power that it should always be capable of exercise. The legislative power and the judicial power come into play at inter-

⁶⁴ See 52 Cong. Rec. 1369-70 (1915). The reader should recall the political furor ignited by the events occurring after the retirement of Justice Van Devanter from the Supreme Court in 1937. Almost two months elapsed without President Roosevelt's taking any action in reference to that vacancy. With political wounds still smarting from the "Court-packing" issue, speculation soon arose that the President was awaiting the adjournment of Congress before filling the vacancy. Such a course of action appeared imminent when the White House announced that the President has been advised by the Attorney General (Cummings) that such a recess appointment was within his power. Whether or not the President was seriously contemplating a recess appointment or merely vexing Congressional nerves will probably never be revealed, for he cut short all debates on the propriety and legality of such a recess appointment by the nomination of Hugo Black to the Supreme Court. Black's subsequent confirmation closed the door on what might have been an effort to settle conclusively the proper construction of the elusive phrase "may happen." See *supra* notes 5 and 64. See also N.Y. Times, July 28, 1937, p. 1, col. 1; N.Y. Times, Aug. 4, 1937, p. 1, col. 1; 81 Cong. Rec. 7963, 8071-76, 8101-4, 8165 (1937).

⁶⁵ The Act of Feb. 9, 1863, c. 25, sec. 2, 12 Stat. 646 (R.S. 1761) provided that any recess appointee filling a vacancy which existed while the Senate was in session would not be paid a salary until confirmed by the Senate. Congress implicitly assumed that the recess appointment power existed, but sought to render it ineffective. See 16 Ops. Att'y Gen. 522, 531 (1880); 67 Cong. Rec. 263-64 (1925). The plight of such a recess appointee was somewhat alleviated by congressional action in 1940. The Act of July 11, 1940, c. 580, 54 Stat. 751, 5 U.S.C. §56 (1940) provides payment if the vacancies arose within 30 days prior to the termination of the session of the Senate, or if at the time of such termination a nomination was pending before the Senate for action, or if within 30 days prior to such termination the Senate rejected a nominee for the office. See S. Rep. No. 1079, 76th Cong., 1st Sess. (1939); H. Rep. No. 2646, 76th Cong., 3d Sess. (1940); 28 Comp. Gen. 30, 121, 238 (1948).

⁶⁶ In *re* Farrow, 3 Fed. 112 (C.C.N.D. Ga. 1880); In *re* Yancey, 28 Fed. 445 (C.C.W.D. Tenn. 1886); *State ex rel. Fritts v. Kuhl*, 51 N.J.L. 191, 17 A. 102 (1889); *Peck v. United States*, 39 Ct. Cl. 125 (1904); *Gould v. United States*, 19 Ct. Cl. 593 (1884). See also dissent in *Murphy v. People ex rel. Lehman*, 78 Colo. 276, 242 P. 57 (1925).

Contra: *Case of the District Attorney of the United States*, 7 Fed. Cas. 731 (No. 3924) (C.C. E.D. Pa. 1868); *Schenck v. Peay*, 21 Fed. Cas. 667 (No. 12451) (C.C.E.D. Ark. 1869).

vals. There are, or may be, periods when there is no legislature in session to pass laws, and no court in session to administer laws, and this without public detriment; but always and everywhere the power to execute the laws is, or ought to be, in full exercise. The President must take care at all times that the laws be faithfully executed. There is no point of time in which the power to enforce or execute the laws may not be required, and there should not be any point of time or interval in which that power is dormant or incapable of acting.⁶⁷

It is argued that the majority view is more compatible with the reason and spirit of the Constitution and more conducive to insuring continuity in the functions of government during the recess of Congress. Nonetheless, when one considers the persuasive argumentation of Judge Cadwallader in the *Case of the District Attorney of the United States*,⁶⁸ it appears that the minority interpretation is academically compelling and quite possibly the correct one. The majority construction is viewed as an unnecessary and potentially-dangerous extension of presidential power based solely upon expediency, an encroachment on senatorial power, permitting the President to do indirectly what he cannot do directly. Judge Cadwallader also noted that the alleged power had not been exercised without the constant recurrence of suggestions doubting the existence of the power. That the same question has been repeatedly raised may indicate that no settled administrative usage has been firmly established. An important and possibly determinative distinction is made between filling a vacancy and seeing that the vacancy occasions no failure in the execution of the laws. Any inadequacy in the appointing power should be corrected, according to Judge Cadwallader, by legislative rather than interpretive remedies.

It appears that both minority and majority views are tenable, the latter at least pragmatically. Yet, one wonders whether expediency alone, which appears to be the keystone of the majority construction, should be determinative of those powers having constitutional sanction. Unfortunately, the opinions of the Attorneys General have apparently been resorted to as the sole conclusive authority by the followers of the "exist" school. Query, whether these opinions should be accorded such weight. Do not such opinions, as argued by Allocco, "necessarily reflect a presidential desire to justify a particular practice"? Is not the Attorney General merely an extension of the Executive arm, as are the other Cabinet members? Rebutting Allocco's contention, as the court did, by answering that the President and the Attorney General are "sworn to uphold the Constitution" is hardly a consolation.

It is hoped that this problem will be reviewed by the lawmakers and that

⁶⁷ 12 Ops. Att'y Gen. 32, 35-36 (1886).

⁶⁸ 7 Fed. Cas. 731 (No. 3924) (E.D. Pa. 1868). See also *Schenck v. Peay*, *supra* note 66; 2 Executive Journal of the Senate 415, 500 (1814); S. Rep. No. 80, 37th Cong., 3d Sess. (1863); 81 Cong. Rec. 8165, 75th Cong., 1st Sess. (1937).

an authoritative determination somewhat along the lines of the minority interpretation will be forthcoming. The present construction of the power is extremely broad and not at all conducive to the proper functioning of our system of "checks and balances."

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