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## Recess Appointments of Federal Judges

**September 5, 2001**

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## Summary

On December 27, 2000, President Bill Clinton used his recess appointment power to place Roger L. Gregory on the Fourth Circuit. The Constitution provides that such appointments “shall expire at the End of their next Session” (in this case, at the end of 2001). This was the first time since President Carter that the recess appointment procedure had been used to select someone to an Article III judgeship, which provides for life tenure and no diminution of salary. The appointment of Gregory raised questions about the meaning of the Recess Clause, Senate prerogatives, and the opportunity of a litigant in federal court to have a case handled by a judge with full independence. On July 20, the Senate confirmed Judge Gregory to a life term.

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# Recess Appointments of Federal Judges

On December 27, 2000, President Bill Clinton used his recess appointment power to place Roger L. Gregory on the Fourth Circuit. The Constitution provides that such appointments “shall expire at the End of their next Session” (in this case, at the end of 2001). This was the first time since President Carter that the recess appointment procedure had been used to select someone to an Article III judgeship. The appointment of Gregory raised questions about the meaning of the Recess Clause, Senate prerogatives, and the opportunity of a litigant in federal court to have a case handled by a judge with full independence.

The recess appointment power has been used in some instances for non–Article III judges. Judges on Article III, or constitutional, courts are entitled to lifetime tenures and are protected against diminution of their salaries. Those privileges do not extend to non–Article III courts (also called Article I or legislative courts). Over the past two centuries, Article I courts have included territorial courts, legislative courts, military courts, U.S. magistrates, and, at various times, the courts of the District of Columbia. On December 10, 1997, President Clinton used his recess appointment power to place Christine Odell Cook Miller on the U.S. Court of Federal Claims, which is an Article I court because the judges have 15-year terms. Similarly, on January 19, 2001, President Clinton selected Sarah L. Wilson as a recess appointee to the same court. This report focuses on recess appointments of Article III judges.

## Recess Clause

The Constitution gives the President the power to nominate, “and by and with the Advice and Consent of the Senate,” appoint ambassadors, other public ministers and consuls, Justices 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.” The President also has 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.”<sup>1</sup>

The framers recognized that the Senate would not always be in session to give advice and consent to presidential nominations. To cover these periods, the President is authorized to make recess appointments that are needed to keep government operating effectively. This provision was adopted at the Constitutional Convention without a dissenting vote and with virtually no record to fix its intent and scope.<sup>2</sup> The

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<sup>1</sup> U.S. Const. art. II, § 2, cl. 3.

<sup>2</sup> 2 The Records of the Federal Convention of 1787, at 540, 574, 600, 660 (New Haven: Yale (continued...))

power to make recess appointments is stated in general terms, with no distinctions between its application to judges or non-judges. However, there is a tension between the appointment of recess judges—serving on a temporary basis—and the general principle of judicial independence assured by lifetime tenure.

Federalist No. 67, written by Alexander Hamilton, adds little to the intent of the Recess Clause.<sup>3</sup> He states that the “general mode” of appointing officers of the United States required joint action by the President and the Senate, and that the Recess Clause was “nothing more than a supplement ... for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.” It would have been improper, he said, to oblige the Senate “to be continually in session for the appointment of officers, and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill 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.’”<sup>4</sup> Most of Federalist No. 67 is devoted to rejecting the claim that the President could use the Recess Clause to fill vacancies in the Senate.

## Vacancies That “May Happen”

Hamilton’s essay raises the question of the meaning of “happen” and “recess.” What does the Constitution mean when it refers to vacancies “that may happen during the Recess of the Senate”? Does happen mean “happen to take place” during the recess, as Hamilton suggested? A long list of opinions by Attorneys General has interpreted the language more broadly to mean “happen to exist” at the time of a recess, including vacancies that occur while the Senate is in session and available to give advice and consent. For example, Attorney General Wirt claimed that the second and broader meaning satisfied the reason, scope, and purpose of the Constitution, which to Wirt meant keeping offices filled.<sup>5</sup> Other Attorneys General have reached the same conclusion.<sup>6</sup> In 1880, a federal district court concurred in the position of the Attorney General in opinions issued from 1823 to 1880.<sup>7</sup>

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<sup>2</sup> (...continued)

University Press, 1937, Max Farrand ed.) (hereafter “Farrand”); 3 Farrand 421.

<sup>3</sup> The Federalist, by Alexander Hamilton, James Madison, and John Jay 436-440 (Cambridge, Mass.: Harvard University Press, 1961, Benjamin Fletcher Wright ed.).

<sup>4</sup> Id. at 438-39 (emphasis in original).

<sup>5</sup> 1 Op. Att’y Gen. 631 (1823).

<sup>6</sup> 2 Op. Att’y Gen. 525 (1832); 4 Op. Att’y Gen. 523 (1846); 10 Op. Att’y Gen. 356 (1862); 12 Op. Att’y Gen. 32, 38 (1866); 12 Op. Att’y Gen. 455, 457 (1868); 16 Op. Att’y Gen. 522, 524 (1880); 18 Op. Att’y Gen. 29 (1884); 19 Op. Att’y Gen. 261, 262 (1889); 30 Op. Att’y Gen. 314, 315 (1914); 33 Op. Att’y Gen. 20, 23 (1921); 41 Op. Att’y Gen. 463, 465-66 (1960).

<sup>7</sup> In re Farrow, 3 F. 112, 113-15 (C.C. N.D. Ga. 1880).

## “Recess” of the Senate

The word “recess” also requires interpretation. In 1901, an Attorney General opinion distinguished between the meaning of “adjournment” and “recess” in such a way as to limit *adjournment* to brief periods in the middle of a session, whereas *recess* referred to the period when Congress adjourned at the end of a session. Both words meant the suspension of legislative business, but adjournment implies “a less prolonged intermission than ‘recess.’” An adjournment means a “merely temporary suspension of business from day to day, or, when exceeding three days, for such brief periods over holidays as are well recognized and established and as are agreed upon by the joint action of the two Houses.” Recess refers to “the period after the final adjournment of Congress for the session, and before the next session begins.” Congress “adjourns” in either case, but “[i]t is this period following the final adjournment for the session which is *the recess* during which the President has power to fill vacancies by granting commissions which shall expire at the end of the next session.”<sup>8</sup>

The opinion in 1901 said that earlier opinions by Attorneys General on the recess appointment power “relate only to appointments during the recess of the Senate between two sessions of Congress.”<sup>9</sup> It acknowledged that if Congress “temporarily adjourned” in the middle of a session “for several months as well as several days,” this practice could “seriously curtail the President’s power of making recess appointments.”<sup>10</sup> Nevertheless, the opinion continued to refer to the interval between one session and the next as “*the recess*.”<sup>11</sup>

An Attorney General opinion in 1921 concluded that an adjournment in the middle of a session, from August 24 to September 21, was of sufficient duration to permit recess appointments by the President. Breaking with the 1901 analysis, the Attorney General looked to the “broad and underlying purpose” of the Constitution, which is “to prohibit the President from making appointments without the advice and consent of the Senate whenever that body is in session so that its advice and consent can be obtained.” As to whether the Senate “has adjourned or recessed, 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. To give the word ‘recess’ a technical and not a practical construction, is to disregard substance for form.”<sup>12</sup>

If a President could make recess appointments during an intrasession adjournment from August 24 to September 21, “does it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly

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<sup>8</sup> 23 Op. Att’y Gen. 599, 601 (1901) (emphasis in original).

<sup>9</sup> Id. at 602.

<sup>10</sup> Id. at 603.

<sup>11</sup> Id. at 604 (emphasis in original).

<sup>12</sup> 33 Op. Att’y Gen. 20, 21-22 (1921) (emphasis in original).

answer this by saying no.”<sup>13</sup> The term “recess” required “a practical construction.” When the Senate adjourns for two days, it remains in session. “Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution.”<sup>14</sup> In referring to a Senate report written in 1905, the opinion said that the “essential inquiry” consists of these questions: “Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?”<sup>15</sup>

Subsequent opinions from the Attorney General agreed that significant interruptions in the middle of a session could justify the President’s use of the recess appointment power. According to an opinion in 1960, a temporary recess of the Senate, “protracted enough to prevent that body from performing its functions of advising and consenting to executive nominations,” permits the President to make recess appointments.<sup>16</sup> Following this interpretation, the Senate’s adjournment from July 3 to August 8 in 1960 constituted a “Recess of the Senate.”<sup>17</sup>

Opinions by Attorneys General have concluded that short adjournments “for 5 or even 10 days” do not “constitute the recess intended by the Constitution.”<sup>18</sup> In 1979, an opinion by the Office of Legal Counsel in the Justice Department held that a recess from August 2 until September 4, 1979, would be of sufficient length to entitle the President to make recess appointments.<sup>19</sup> A Justice Department brief in 1993 suggested that recess appointments might be justified for recesses in excess of three days, but the litigation that prompted this statement was not decided on that ground.<sup>20</sup>

## Comptroller General Rulings

The Comptroller General of the General Accounting Office has also offered interpretations of the President’s power to make recess appointments. In 1948, the Comptroller General received a letter from the Director of the Administrative Office of the U.S. Courts, regarding the right of payment to four U.S. judges appointed on a recess basis after the Senate adjourned June 20, 1948, to return on December 31, 1948. The Comptroller General cited with approval an earlier Attorney General opinion, which had upheld the use of the President’s recess appointment power during

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<sup>13</sup> Id. at 24.

<sup>14</sup> Id. at 25.

<sup>15</sup> Id.

<sup>16</sup> 41 Op. Att’y Gen. 463, 466 (1960).

<sup>17</sup> Id.

<sup>18</sup> 33 Op. Att’y Gen. 20, 25 (1921).

<sup>19</sup> 3 Op. Off. Legal Counsel 314 (1979).

<sup>20</sup> Memorandum of Points and Authorities in Support of Defendants’ Opposition to Plaintiffs’ Motion for Partial Summary Judgment, at 24-26, *Mackie v. Clinton*, Civ. Action No. 93-0032-LFO (D.D.C.).

an adjournment from August 24 to September 21, 1921.<sup>21</sup> However, the Comptroller General also ruled that one of the judges was not entitled to payment of salary because of a statutory provision that prohibited payment of salary to an individual who had received a recess appointment during a previous recess of the Senate.<sup>22</sup>

## Funding Limitations

The broad reading of the Recess Clause by Attorneys General prompted Congress to invoke its power of the purse to limit presidential actions. After Attorneys General had handed down a number of opinions on the power to make recess appointments, Senator William Fessenden remarked in 1863: “It may not be in our power to prevent the [recess] 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.”<sup>23</sup>

Fessenden made his comment after the Senate had asked its Judiciary Committee to explore this question: Did the practice of appointing officers to fill vacancies that existed *prior* to a recess, while the Senate was in session, conflict with the Constitution? The committee rejected Attorney General Wirt’s position that a recess appointee may fill a vacancy that occurs during a session. To the committee, interpreting the constitutional language “may happen during the Recess of the Senate” to include what happened before the recess represented “a perversion of language.” Such reasoning, said the committee, tilted political power toward the President and placed undue emphasis on the filling of a vacancy at the expense of Senate prerogatives. Of equal importance to filling vacancies was the need to protect the Senate’s opportunity to pass judgment on the qualification of an officeholder. Unless Congress placed some constraint on the President’s power to make recess appointments, an “ambitious, corrupt, or tyrannical executive” could nullify the Senate’s constitutional function.<sup>24</sup>

## Statutory Language in 1863

Congress passed legislation in 1863 to prohibit the use of funds to pay the salary of anyone appointed during a Senate recess to fill a vacancy that existed “while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate.”<sup>25</sup> Because of this funding restriction, an officer might have to serve without pay (relying on savings or loans) until the Senate consented to the nomination.

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<sup>21</sup> 28 Comp. Gen. 30, 34-37 (1948).

<sup>22</sup> Id. at 37-38.

<sup>23</sup> Cong. Globe, 37th Cong., 3rd sess. 565 (1863).

<sup>24</sup> S. Rept. No. 80, 37th Cong., 3rd sess. 5-6 (1863).

<sup>25</sup> 12 Stat. 646 (1863).



That situation arose during the administration of Woodrow Wilson. George Rublee, nominated to the Federal Trade Commission in March 1915, served for more than a year as a recess appointee. After the Senate voted to reject him, he continued to serve the balance of his recess commission until September 1916, when Congress adjourned. Because of the 1863 legislation, Rublee was not entitled to any remuneration. Congress had to pass a special appropriation to pay his salary for fourteen months: from the date his service began to the date the Senate rejected him.<sup>26</sup>

## Revisions in 1940

In 1940, Congress revised the 1863 law to make it less burdensome on officeholders. Congress changed the law to allow for three exceptions in what is now 5 U.S.C. § 5503. As a general rule, payment may not be made to an individual appointed during a Senate recess to fill an existing office if the vacancy existed while the Senate was in session and was by law required to be filled with Senate advice and consent, until the appointee has been confirmed by the Senate.

However, there are three exceptions. First, payments may be made if a vacancy arises within 30 days before the end of the session of the Senate. Given the shortness of time, nominations submitted during that period would be unlikely to gain the Senate's approval. Second, payments may be made if, at the end of the session, a nomination for the office is pending before the Senate (other than for someone appointed during a preceding recess). This provision protects the Senate from successive recess appointees, and it protects nominees whose names go forward in timely manner. Third, payments may be made if a nomination is rejected by the Senate within 30 days before the end of the session and an individual (other than the one rejected) receives a recess appointment. This exception takes care of possible rejections on the eve of a recess. Moreover, the 1940 statute contains an important limitation: A nomination to fill a vacancy referred to in the three exceptions must be submitted to the Senate not later than 40 days after the Senate's next session begins.<sup>27</sup> "Next session" has been interpreted in a nontechnical way to mean the return of the Senate from its recess, not the next session of a Congress.<sup>28</sup>

## Dispute in 2001

The application of § 5503 to Article I judges was raised in 2001, after President Clinton made a recess appointment of Sarah L. Wilson to the U.S. Court of Federal Claims. President Clinton nominated her after the 107th Congress convened on January 3, 2001.<sup>29</sup> The Senate then recessed from January 8 to January 20. She was given a recess appointment on January 19 but her nomination was not resubmitted to the Senate, as required under § 5503(b).

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<sup>26</sup> 39 Stat. 801 (1916).

<sup>27</sup> 54 Stat. 751 (1950); 5 U.S.C. § 5503 (1994).

<sup>28</sup> 41 Op. Att'y Gen. 463, 477 (1960)

<sup>29</sup> 37 Weekly Comp. Pres. Doc. 105 (2001).

Senator Strom Thurmond wrote to the Administrative Office of the U.S. Courts on May 9, stating his belief that Wilson's salary should be suspended because her appointment violated § 5503. He suggested that the Administrative Office request an opinion on the issue from the Office of Personnel Management or the General Accounting Office.<sup>30</sup> William R. Burchill, Jr., Associate Director and General Counsel of the Administrative Office, replied on May 24 that in the opinion of the Administrative Office it was appropriate to pay Judge Wilson's salary and there was no need to seek any outside confirmation of this understanding. Burchill said that Wilson fell within the exception set forth in subsection (a)(2) of § 5503, which states that the salary cutoff shall not apply if, at the end of a session, "a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent." Wilson's nomination was pending before the Senate when it recessed on January 8.

Burchill agreed that § 5503(b) terminates the entitlement of a recess appointee to pay. However, he said that analyses by the Office of Legal Counsel left it unsettled as to whether the language "next session" in § 5503(b) refers to a post-recess reconvening of the same Congress or the beginning of the session of a Congress that succeeds the adjournment sine die of the current one.<sup>31</sup>

## Annual Limitations

In addition to the funding restrictions in § 5503, funding limitations have been included in the annual Treasury-Postal Service appropriations bill. For example, this language appeared in 2000: "No part of any appropriation for the current fiscal year contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person."<sup>32</sup>

## "Holdover" Provisions

The scope of the recess appointment power can be complicated by the presence of "holdover" clauses in federal statutes. These clauses do not concern the appointment of federal judges, but they have been extensively litigated and help in defining the meaning and application of the Recess Clause. These cases emphasize how Congress, by enacting legislation, can specify when a vacancy exists and expand or limit the President's opportunity to make a recess appointment.

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<sup>30</sup> Letter from Senator Strom Thurmond to the Honorable Leonidas Ralph Mecham, Director, Administrative Office of the U.S. Courts, May 9, 2001.

<sup>31</sup> Letter from William R. Burchill, Jr., Associate Director and General Counsel of the Administrative Office of the U.S. Courts to Senator Strom Thurmond, May 24, 2001, at 2.

<sup>32</sup> 114 Stat. 2763A-157, § 609 (2000).

## The *Staebler* Case

As an example of a holdover clause, a member of the Federal Election Commission may serve after the expiration of that member's term "until his successor has taken office as a member of the Commission." This type of statutory provision has been litigated because it is unclear how the successor takes office: by Senate confirmation (required for new members) or as a recess appointee. According to the FEC statute, any vacancy in the membership of the commission "shall be filled in the same manner as in the case of the original appointment" (presumably by Senate confirmation). However, on October 25, 1978, President Carter made John McGarry a recess appointee to the seat held by Neil Staebler, who was serving in a holdover capacity. Staebler refused to leave office, arguing that McGarry had not been confirmed by the Senate and therefore no vacancy existed for Carter to fill.

A federal district judge, deciding against Staebler, pointed to some difficulties with the statute. If a vacancy existed only at the point of confirmation for a successor, this might place an unmanageable task on the President. How could he recruit someone for the office and submit a nomination if, in theory, no vacancy existed? The court also concluded that such a result would disrupt the statutory design of staggered, six-year terms for the six commissioners. Following Staebler's interpretation, the statutory dates for these terms might shift to take account of holdovers, creating a "baggage of peculiar practical difficulties."<sup>33</sup> The court could find no clear evidence that Congress had tried to restrict the President's power to make recess appointments.<sup>34</sup> If the Senate wanted to protect its right to advise and consent, it could have rejected McGarry's nomination when Carter first sent it up on September 27, 1977, and again on April 10, 1978. It was only after two years of Senate inaction that Carter made the recess appointment.<sup>35</sup> On appeal, the D.C. Circuit dismissed the case as moot, remanding it to the district court.

Controversies over holdover positions turn on the particular language that Congress enacts. The power to make recess appointments has been a major issue in the life of the Legal Services Corporation (LSC). Through the use of holdover provisions and recess appointments, Presidents Reagan and Bush were able to largely circumvent the Senate's power of confirmation. Several recent court decisions explore the President's power to make recess appointments to the LSC and to other agencies.<sup>36</sup> These decisions analyzed statutory language, such as the length of time the person could remain in holdover status, and whether the holdover "shall" or

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<sup>33</sup> *Staebler v. Carter*, 464 F.Supp. 585, 589 (D.D.C. 1979).

<sup>34</sup> *Id.* at 592.

<sup>35</sup> *Id.* at 601. For the Senate's record on McGarry, see *id.* at 587.

<sup>36</sup> *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996); *Wilkinson v. Legal Services Corp.*, 865 F.Supp. 891 (D.D.C. 1994), reversed on other grounds, *Wilkinson v. Legal Services Corp.*, 80 F.3d 535 (D.C.Cir. 1996); *Mackie v. Clinton*, 827 F.Supp. 56 (D.D.C. 1993); *McCalpin v. Durant*, 766 F.2d 535 (D.C. Cir. 1985); *McCalpin v. Dana*, No. 85-542 (D.D.C. 1982). See "An LSC Dispute May Take Power from President," *National Law Journal*, February 19, 1996, at A1.

“may” continue to serve in office. Thus, the scope of the recess appointment power in these areas depends on the particular language that Congress places in a statute.

## Political Accommodations

Confrontations over recess appointments in the 1980s and 1990s led to political agreements between the executive and legislative branches. Although Presidents claimed full constitutional authority to exercise the Recess Clause, they recognized that excessive use of this power could trigger credible threats from Senators to place a hold on all nominations until the White House agreed to an acceptable compromise that satisfied the institutional prerogatives of both branches.

### Nomination of Martha Seger

On May 31, 1984, President Reagan nominated Martha R. Seger to be a member of the Board of Governors of the Federal Reserve System.<sup>37</sup> The Senate Banking Committee had held four days of hearings and approved her nomination by the close vote of 10 to 8. A spirited floor debate was expected, but that was foreclosed when Reagan gave her a recess appointment on July 2 after Congress took a three-week break for the Fourth of July holiday (from June 29 to July 23).<sup>38</sup> Senator William Proxmire, chairman of the Banking Committee, accused Reagan of abusing his recess appointment powers and promised to devise remedies that would restrict the President’s authority.<sup>39</sup> Lawmakers also objected to other recess appointments made by Reagan.<sup>40</sup>

On August 8, Senator Max Baucus offered an amendment to a supplemental appropriations bills, calling on President Reagan to withdraw the recess appointment for Seger. The Senate voted 53-43 to table the amendment.<sup>41</sup> A day later, Senate Minority Leader Robert C. Byrd introduced a Senate resolution (S.Res. 430), stating that it was the sense of the Senate that the power to make recess appointments should be confined to situations in which the Senate has formally terminated a session or in which the Senate will be in recess for longer than 30 days.<sup>42</sup> That resolution was never put to a vote, but a year later the Senate passed a different resolution offered by Senator Proxmire (S.Res. 194), expressing the sense of the Senate that recess appointments should not be made to the Federal Reserve Board except under unusual circumstances, and only for the purpose of fulfilling “a demonstrable and urgent need” in the administration of the board’s activities. The Senate also agreed to consider

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<sup>37</sup> Public Papers of the Presidents, 1984, II, at 777.

<sup>38</sup> *Id.* at 1915.

<sup>39</sup> “Proxmire: Seger Appointment Cut Constitutional Corners,” *Washington Post*, July 6, 1984, at D3.

<sup>40</sup> “Reagan’s Recess Hirings Elicit Resentment,” *Washington Post*, July 11, 1984, at A17; “Reagan’s Recess Appointments Rankle Hill,” *Washington Post*, July 14, 1984, at 1698.

<sup>41</sup> 130 Cong. Rec. 22767-82 (1984).

<sup>42</sup> *Id.* at 23234-36, 23341.

nominations to the board in an expeditious manner. The resolution was agreed to by voice vote.<sup>43</sup>

On June 13, 1985, the Senate confirmed Seger by voice vote for a term expiring in 1998. On this occasion the Senate Banking Committee voted 11-4 for her confirmation.<sup>44</sup> Although there was controversy over her recess appointment, there was never a question of using a funding restriction to deny appropriated funds for her salary. The Federal Reserve relies on nonappropriated funds to support its operations.

A separate Byrd resolution (S.Res. 213), which the Senate did not act on, stated that the recess appointment power should be confined to a formal termination of a session of the Senate or a recess “protracted enough to prevent it from discharging its constitutional function of advising and consenting to executive nominations.” Moreover, it stated that since Presidents and departmental heads were authorized by the Vacancies Act at that time to make temporary appointments for at least 30 days, “no recess appointment should be made when the Senate stands adjourned or recessed within a session for a period of less than thirty days.” Finally, the resolution stated that no recess appointment should be made of any person to any office (1) if the person has previously, during the same presidential term, been nominated for appointment to the office, and (2) the Senate has voted not to give its advice and consent to such appointment, or the appropriate committee of the Senate has voted not to report the nomination to the Senate.<sup>45</sup>

## **Agreement with Senator Byrd**

On July 30, 1985, when the Senate was about to recess for the August break, Senator Byrd wrote to President Reagan, stating that the recess should not be considered “the kind of extended recess” contemplated for recess appointments. A broader interpretation, he said, could be seen as “a deliberate effort to circumvent the Constitutional responsibility of the Senate to advise and consent to such appointments.”<sup>46</sup> When President Reagan continued to use his recess appointment power broadly, Byrd responded late in 1985 by holding up action on presidential nominations.<sup>47</sup> Senate Majority Leader Bob Dole spoke on September 30 about Byrd’s “real concern” about recess appointments and hoped to set up a meeting with the Administration “to allay some of the concerns the distinguished minority leader has.”<sup>48</sup> On October 8, the White House announced that President Reagan was

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<sup>43</sup> 131 Cong. Rec. 17622-24, 17679 (1985).

<sup>44</sup> 1985 CQ Almanac 420.

<sup>45</sup> Id. at 22419, 22496-97.

<sup>46</sup> Id. at 22498.

<sup>47</sup> “Recess Appointments Raise Senators’ Anger,” *Washington Post*, September 26, 1985, at A23; *Public Papers of the Presidents, 1985 (II)*, at 1209; “White House Asks End of Appointee ‘Backlog,’” *Washington Post*, October 9, 1985, at A17.

<sup>48</sup> 131 Cong. Rec. 25303 (1985).

“deeply displeased” that Byrd had held up 70 appointments “touching virtually every area of the executive branch,” including executive officials and federal judges.<sup>49</sup>

On October 10, a meeting was held in Senator Byrd’s office to discuss the problem of recess appointments. In attendance were Senators Dole, Daniel Inouye, Strom Thurmond, and Howard Metzenbaum, plus two officials from the White House, Max Friedersdorf and Fred Fielding. It was agreed that the White House would give notice to the majority and minority leaders prior to a recess, and that the notice would be enough in advance to give the leaders an opportunity to comment on potential recess appointments.<sup>50</sup>

## George Mitchell Understanding

On August 4, 1989, Senate Majority Leader George Mitchell warned President George Bush not to give a recess appointment to William Lucas, who had been rejected by the Senate Judiciary Committee to head the Civil Rights Division in the Justice Department. Mitchell argued that the recess appointment power should not be used to sidestep the Senate, and that making a recess appointment of a nominee “who was considered and rejected by the relevant Senate committee . . . would be a very unwise course of action.”<sup>51</sup> Lucas did not receive the recess appointment. Instead, Bush named him to be director of the Justice Department’s Office of Liaison services, a position that did not require Senate confirmation.<sup>52</sup>

In November 1989, White House Chief of Staff John Sununu suggested that unless the Senate moved more quickly on nominations, President Bush might resort to recess appointments.<sup>53</sup> In a floor statement, Mitchell reiterated the understanding that Senator Byrd had developed on procedures for recess appointments, especially the practice of Presidents notifying party leaders in advance of recess appointments.<sup>54</sup> In 1993, in response to a recess appointment made by President Bush less than two weeks before leaving office, Senator Mitchell placed in the *Congressional Record* an analysis of the recess appointment power prepared by the Senate Legal Counsel. It had been prepared as an amicus brief, to present the Senate’s position in a pending recess appointment case, but failed to receive the necessary bipartisan support. The analysis reviewed earlier understandings that the recess appointment power would be utilized “only, and rarely, during substantial intrasession breaks.” However, that understanding had now been replaced by the executive branch’s claim that “there is no lower time limit” in making recess appointments, a position that “threatens to

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<sup>49</sup> Public Papers of the Presidents, 1985, II, at 1209; “White House Asks End to Appointee ‘Backlog,’” Washington Post, October 9, 1985, at A17.

<sup>50</sup> 131 Cong. Rec. 27312-13, 27686-87 (1985).

<sup>51</sup> “Mitchell Opposes Recess Appointment,” Washington Post, August 5, 1989, at A5.

<sup>52</sup> 1989 CQ Almanac 31.

<sup>53</sup> “Senate Pressed on Nominees,” Washington Post, November 11, 1989, at A25.

<sup>54</sup> 135 Cong. Rec. 28390, 31445-46 (1989); “Mitchell Cautions On Appointments,” Washington Post, November 15, 1989, at A19.

produce a high level of uncertainty, with regard to appointments, into the relationship between the branches.”<sup>55</sup>

## Guidelines Under Clinton

When the Senate recessed on August 2, 1996, to return on September 3, there was speculation about who President Clinton might appoint on a recess basis. It was considered unlikely that he would make recess appointments of six pending names for federal judgeships: Merrick Garland for the D.C. Circuit, Arthur Gajarsa for the Federal Circuit, William A. Fletcher for the Ninth Circuit, Eric Clay for the Sixth Circuit, and Margaret M. Morrow and Susan McIlway for district court seats. Senate objections would be strong, placing other nominations in jeopardy. Also, the candidates for these federal positions, “especially out-of-towners with families to move, often say they would prefer waiting around for confirmation rather than risk losing the new appointment after little more than a year on the job.”<sup>56</sup>

On June 4, 1999, President Clinton issued a recess appointment to James C. Hormel to be ambassador to Luxembourg. The Senate was in recess from May 27 to June 7. When the Senate returned, Senator James Inhofe announced: “I am going to do the same thing Senator Byrd did back in 1985: I am putting holds on every single Presidential nomination.”<sup>57</sup> Inhofe charged that Clinton treated the Senate confirmation process “as little more than a nuisance which he can circumvent whenever he wants to impose his will on the country.”<sup>58</sup> Inhofe said he would continue to block nominations until Clinton agreed to make them only if Congress was notified in advance and they were “absolutely necessary.”<sup>59</sup>

President Clinton had followed the practice of notifying Senate leaders before a recess when he intended to make a recess appointment. In the case of Hormel, however, he did not notify the leaders until June 3, the night before he made the appointment. By that time the Senate had already been in recess for a week.<sup>60</sup> In his response to the Inhofe threat, Clinton wrote to Senator Lott on June 15, stating that his Administration “has made it a practice to notify Senate leaders in advance of our

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<sup>55</sup> 139 Cong. Rec. 15267 (1993). See “Recess Appointments: A Disputed Matter of Timing,” *Washington Post*, July 19, 1993, at A13.

<sup>56</sup> “The Recess Appointment Game,” *Washington Post*, August 12, 1996, at A11.

<sup>57</sup> 145 Cong. Rec. S6654 (daily ed. June 8, 1999).

<sup>58</sup> “Choice of Hormel Spurs Vow to Block Nominees,” *Washington Post*, June 9, 1999, at A23.

<sup>59</sup> “In Protest of Clinton Action, Senator Blocks Nominations,” *New York Times*, June 9, 1999, at A20.

<sup>60</sup> “Clinton Vow to Congress Ends a Threat to His Nominations,” *New York Times*, June 17, 1999, at A22.

intentions in this regard, and this precedent will continue to be observed.”<sup>61</sup> With that agreement in place, Inhofe dropped his threat to block nominations.<sup>62</sup>

The issue flared up again on November 17, 1999, when Senator Inhofe challenged what he considered to be an improper use of the recess appointment power. It was his position that recess appointments “can only be made in the event the vacancy occurs during the recess.”<sup>63</sup> A more expansive reading, he said, would magnify executive power at the expense of the Senate prerogative of advice and consent. He reviewed the understanding that Senator Byrd and President Reagan had reached in 1985. Prior to any recess break, the White House would inform the Majority Leader and the Minority Leader of any recess appointment that might be contemplated during the recess. The advance notice would be sufficiently early to allow the leadership on both sides to take action to fill “whatever vacancies that might be imperative during such a break.”<sup>64</sup>

President Clinton had agreed to that procedure in his June 15, 1999, letter to Senator Lott, in which he said “I share your opinion that the understanding reached in 1985 between President Reagan and Senator Byrd cited in your letter remains a fair and constructive framework, which my Administration will follow.”<sup>65</sup> If the Administration violated the spirit of the agreement, Inhofe and 15 other Senators advised Clinton by letter that they would place holds on “all judicial nominees.”<sup>66</sup>

Senator Inhofe read into the *Congressional Record* the names of 13 people submitted by the White House for appointment.<sup>67</sup> The White House-Senate agreement provided a framework but was not strictly adhered to. Some recess appointments were made of names not on the list, and Senator Inhofe was unable to place a total hold on all judicial nominees.<sup>68</sup> On February 11, 2000, the Senate approved Thomas L. Ambro for the Third Circuit and Joel A. Pisano for a district judgeship.<sup>69</sup>

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<sup>61</sup> Id.

<sup>62</sup> “Inhofe Ends Threat to Clinton Nominees,” *Washington Post*, June 17, 1999, at A17.

<sup>63</sup> 145 Cong. Rec. S14665 (daily ed. November 17, 1999).

<sup>64</sup> Id.

<sup>65</sup> Id. at S14666.

<sup>66</sup> Id. The Senators signing the letter included Jesse Helms, Wayne Allard, Michael Crapo, Michael B. Enzi, Bob Smith, George Voinovich, Pete B. Domenici, James M. Inhofe, Phil Gramm, Mitch McConnell, Craig Thomas, Rod Grams, Tim Hutchinson, Conrad Burns, Chuck Grassley, and Richard Shelby.

<sup>67</sup> Id. at S15060 (daily ed. November 19, 1999).

<sup>68</sup> “Recess appointee wasn’t on list,” *Washington Times*, December 22, 1999, at A1; “Senator Vows to Stall Action on Judgeships,” *New York Times*, December 21, 1999, at A22; 146 Cong. Rec. S582-84 (daily ed. February 10, 2000); CRS Report RL30821, “Recess Appointments Made by President Clinton,” by Rogelio Garcia (January 26, 2001).

<sup>69</sup> 146 Cong. Rec. S584-89 (February 10, 2000); “Lott Overrides ‘Holds’: Two Judges (continued...)”



## Recess Appointments of Article III Judges

In 1789, President George Washington made three recess appointments to the federal district courts.<sup>70</sup> From 1789 to 1799, the recess appointment power was used to appoint nine other individuals to federal courts.<sup>71</sup> All were later confirmed by the Senate, except for John Rutledge, who Washington had made Chief Justice under a recess appointment.

### John Rutledge

In 1795, John Jay resigned his position as Chief Justice to assume the office of Governor of New York. On July 1, President Washington wrote to John Rutledge of South Carolina, stating that his commission as Chief Justice would take effect on that day as a recess appointee.<sup>72</sup> Rutledge had served as Associate Justice of the U.S. Supreme Court from 1789 to 1791, but resigned that position to become Chief Justice of the South Carolina Court of Common Pleas.

After having been named Chief Justice as a recess appointee, Rutledge gave an intemperate speech on July 16, 1795, bitterly attacking the Jay Treaty. He called it a surrender of American privileges and a “prostitution of the dearest rights of free men.” Calling provisions in the treaty the “grossest absurdities” and “ridiculous and inadmissible,” he said it would be better for President Washington to die, much as he loved him, than sign the treaty.<sup>73</sup> The speech prompted reports that Rutledge was insane and “daily sinking into debility of mind and body.”<sup>74</sup>

On December 10, 1795, President Washington nominated Rutledge to a full life term as Chief Justice. The Senate defeated the nomination five days later, voting 10 to 14.<sup>75</sup> The debate on the nomination is not included in the *Annals of Congress* or the *Senate Executive Journal*. On December 26, Rutledge attempted to drown

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<sup>69</sup> (...continued)

Confirmed,” Washington Post, February 11, 2000, at A4.

<sup>70</sup> 30 The Writings of George Washington 457-58, 473, 485 n.75 (Washington, D.C.: Government Printing Office, 1940).

<sup>71</sup> Robert Morris, recess appointment of August 28, 1790; William Lewis, July 14, 1791; Thomas Johnson, August 5, 1791; Samuel Hitchcock, September 3, 1793; John Rutledge, July 1, 1795; Joseph Clay, Jr., September 16, 1796; Benjamin Bourne, October 13, 1796; Bushrod Washington, September 29, 1798; James Winchester, October 1, 1799 (Second Supplemental Brief for the United States, *United States v. Woodley*, No. 82-1028, Ninth Circuit, 1983, at A1-A25).

<sup>72</sup> 34 The Writings of George Washington 225. The temporary commission is reprinted in 1 *Documentary History of the Supreme Court of the United States, 1789-1800*, at 96 (New York: Columbia University Press, 1985, Maeva Marcus & James R. Perry, eds.).

<sup>73</sup> Leon Friedman, “John Rutledge,” in 1 *The Justices of the United States Supreme Court, 1789-1969*, at 45 (New York: Chelsea House Publishers, 1969).

<sup>74</sup> *Id.* at 46.

<sup>75</sup> 1 *Journal of the Executive Proceedings of the Senate* 195-96.

himself by jumping off a wharf into Charleston Bay.<sup>76</sup> Two days later he wrote to President Washington, resigning his commission as a recess appointee to the position of Chief Justice. He said he was “convinced by Experience, that it requires a Constitution less broken than mine, to discharge with Punctuality & Satisfaction, the Duties of so important an Office.”<sup>77</sup>

Presidents continued to make recess appointments for federal judges. In 1983, as an appendix to a brief filed in the case of *United States v. Woodley*, the Justice Department prepared a list of 309 individuals who had received recess appointments to Article III courts.<sup>78</sup>

## Eisenhower’s Appointments

President Dwight D. Eisenhower placed three men on the Supreme Court after recesses by the Senate: Earl Warren, William J. Brennan, Jr., and Potter Stewart. Warren was appointed on a recess basis on October 2, 1953, Brennan on October 15, 1956, and Stewart on October 14, 1958. All three joined the Court and participated in decisions before the Senate had an opportunity to review their credentials. In each case the Senate later gave its advice and consent, but the experience convinced a number of Senators that the procedure was defective for the Senate as well as for the Court.

An article in the *Stanford Law Review* in 1957 reviewed previous recess appointments to the Supreme Court. Although nine such appointments occurred from 1791 to 1862, 91 years elapsed before the recess appointment of Earl Warren. Moreover, of the nine appointments, only two nominees (John Rutledge in 1795 and Benjamin Curtis in 1851) sat on the Court and participated in decisions before being nominated for a life term.<sup>79</sup> The article discussed a number of problems with recess appointments to the federal courts, including the need for a judge to participate and decide cases while having “one eye over his shoulder on Congress,” possibly depriving the litigants of a fair hearing.<sup>80</sup>

Members of the House were also concerned about placing individuals on the courts on a recess basis. In January 1959, the House Committee on the Judiciary released a 40-page report entitled “Recess Appointments of Federal Judges.” In transmitting the report, committee chairman Emanuel Celler said that the purpose of lifetime appointments “is to secure independence of mind to our judges.” If someone is placed on the court with a recess appointment, that person might “measure his decisions” against the knowledge that the Senate Judiciary Committee will later

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<sup>76</sup> Friedman, “John Rutledge,” at 48.

<sup>77</sup> 1 Documentary History of the Supreme Court 100.

<sup>78</sup> Second Supplemental Brief for the United States, *United States v. Woodley*, No. 82-1028, Ninth Circuit, at A1-A25.

<sup>79</sup> “Recess Appointments to the Supreme Court—Constitutional But Unwise?,” 10 *Stan. L. Rev.* 124, 125, 131 (1957).

<sup>80</sup> *Id.* at 144.

question those rulings. Moreover, it could be argued that the Constitution “guarantees litigants a trial before lifetime judges.”<sup>81</sup>

On May 5, 1959, the Senate confirmed Potter Stewart as a Justice of the Supreme Court by the vote of 70 to 17.<sup>82</sup> During the debate, Senator Philip Hart expressed his concern about passing judgment on a judicial nominee who has already been sitting as a recess appointee. As a member of the Senate Committee on the Judiciary with the responsibility for evaluating judicial nominees, he said that the practice of making interim appointments to the Court and having the appointee take his place on the Court “is one which should cease.”<sup>83</sup>

## Senate Resolution in 1960

In 1960, Senator Hart introduced S.Res. 334 to discourage Presidents from using recess appointments for Justices of the Supreme Court. The resolution stated that it was the sense of the Senate that this type of recess appointment “is not 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.” Such appointments should be avoided “except under unusual and urgent circumstances” and, in all such cases, the appointee should not take his seat on the Court until the Senate had given its advice and consent.<sup>84</sup>

As reported by the Senate Committee on the Judiciary, the resolution spoke about institutional interests, such as the “solemn constitutional tasks” of the Senate giving or withholding advice and consent with respect to nominations made to the Supreme court, and doing so, “if possible, in an atmosphere free from pressures inimical to due deliberations.” Nominations for the Court “should be considered only in the light of the qualifications the person brings to the threshold of the office.” Although previous Presidents had made recess appointments to the Court, “which actions were unquestionably taken in good faith and with a desire to promote the public interest,” those appointments were not made with “a full appreciation of the difficulties thereby caused the members of this body.” Finally, there is “inevitably public speculation” about the independence of a Justice serving on a recess basis, forced to sit in judgment on cases prior to Senate confirmation. Such speculation, “however ill founded, is distressing to the Court, to the Justice, to the litigants, and to the Senate of the United States.”<sup>85</sup>

As a Senate resolution, Hart’s proposal could have no legally binding effect, but it was intended to express the position of the Senate and to guide executive actions. Senator Hart referred to the difficulty under which the Senate operated when asked

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<sup>81</sup> “Recess Appointments of Federal Judges,” House Committee on the Judiciary, 86th Cong., 1st sess. iii (Comm. Print, January 1959).

<sup>82</sup> 105 Cong. Rec. 7472 (1959).

<sup>83</sup> Id. at 7467.

<sup>84</sup> 106 Cong. Rec. 12761 (1960).

<sup>85</sup> S. Rept. No. 1893, 86th Cong., 2nd sess. 1-2 (1960).

to pass upon the nomination of someone who had already taken a seat as a Justice of the Supreme Court: “it operates to a very great disadvantage upon the Members of the Senate, and I suggest that if this should develop as a traditional practice, as what should be done always, rather than under unusual circumstances, it would adversely affect the Court.”<sup>86</sup>

Jefferson B. Fordham, dean of the University of Pennsylvania Law School, remarked that a recess appointee “is serving under the overhang of Senate consideration of a nomination, which is not in harmony with the constitutional policy of judicial independence.”<sup>87</sup> Senator Hart added that disappointed litigants might wonder whether the outcome of their case had been influenced by a judge’s recess status. Judicial independence, in his view, could be affected by several factors:

Either to take a position during his period of probation which would please the President who had appointed him and who could withdraw his name; or to please the Senate, which sooner or later, would either approve or disapprove; or, at the other extreme, conscious of the fact that there would be public scrutiny and interpretation of his action in light of whether he was bending to the Senate or to the President, he could rear back and bend the other way in order to prove that he was subservient to neither branch.<sup>88</sup>

Opponents of the resolution argued that the President needs to make recess appointments because of the Court’s heavy workload.<sup>89</sup> They regarded the filling of vacancies on the Court during recesses as a constitutional power lodged in the President, and felt the Senate should not attempt to meddle with it.<sup>90</sup> It was noted that the power of the Senate is limited to the time after a Justice is nominated, not before.<sup>91</sup> Some Senators objected that the resolution’s language was phrased in ambiguous fashion.<sup>92</sup> Finally, it was objected that the resolution had never been referred to the Justice Department or the Judicial Conference for comment, nor had there been any hearings on the resolution.<sup>93</sup> The resolution, including the preamble, reads as follows:

Whereas one of the solemn constitutional tasks enjoined upon the Senate is to give or withhold its advice and consent with respect to nominations made to the Supreme Court of the United States, doing so, if possible, in an atmosphere free from pressures inimical to due deliberation; and

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<sup>86</sup> 106 Cong. Rec. 18131 (1960).

<sup>87</sup> Id. at 18132.

<sup>88</sup> Id. at 18134.

<sup>89</sup> Id. at 18133 (Senator Hruska).

<sup>90</sup> Id. at 18134 (Senator Wiley).

<sup>91</sup> Id. at 18135 (Senator Wiley).

<sup>92</sup> Id.

<sup>93</sup> Id. at 18137 (Senator Hruska).

Whereas the nomination of a person to the office of Justice of the Supreme Court should be considered only in the light of the qualifications the person brings to threshold of the office; and

Whereas Presidents of the United States have from time to time made recess appointments to the Supreme Court, which actions were unquestionably taken in good faith and with a desire to promote the public interest, but without a full appreciation of the difficulties thereby caused the Members of this body; and

Whereas there is inevitably public speculation on the independence of a Justice serving by recess appointment who sits in judgment upon cases prior to his confirmation by this body, which speculation, however ill founded, is distressing to the Court, to the Justice, to the litigants, and to the Senate of the United States: Now, therefore be it

*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.

The Senate passed the resolution 48 to 37, voting largely along party lines.<sup>94</sup> Democrats supported it 48-4, with Republicans opposed 33 to 0. The four Democrats voting against the resolution were Edmund Muskie of Maine, Frank Lausche of Ohio, John Pastore of Rhode Island, and Albert Gore of Tennessee.<sup>95</sup>

## Litigation

The constitutionality of recess appointments to the federal bench has been litigated in two cases in federal circuit courts. The Supreme Court has not ruled on the issue. When the two cases reached the Court for review, the Court denied certiorari. One case resulted from an appointment by President Dwight D. Eisenhower in 1955. The other case involved an appointment by President Jimmy Carter in 1980.

### The *Allocco* Case

On July 31, 1955, Judge Samuel H. Kaufman retired as U.S. district judge for the Southern District of New York. On August 2, the Senate adjourned for the first session of the 84th Congress. On August 17, President Eisenhower issued a recess appointment to John M. Cashin to fill the vacancy left by Kaufman. Cashin took the oath of office for the recess appointment on September 15. Dominic Allocco was tried before Judge Cashin, found guilty by a jury on October 20, and sentenced to 10 years imprisonment. After the Senate reconvened in January 1956, Cashin was confirmed by the Senate and commissioned as a judge with life tenure. He took the oath of office for the commission on March 9, 1956.

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<sup>94</sup> Id. at 18145.

<sup>95</sup> 1960 CQ Almanac, at 517.

Allocco argued that his sentence should be set aside because Judge Cashin was not constitutionally empowered to preside over the trial. He maintained that (1) the President has no power to appoint “temporary” judges, (2) if the President can make interim appointments of judges, they may not preside over criminal trials, and (3) the President has no power to fill vacancies in the judiciary that arise when the Senate is in session.<sup>96</sup>

The Second Circuit ruled that Judge Cashin was constitutionally empowered to preside over the trial. It noted that the Constitution expressly gives the President power to fill up “all” vacancies and that there are no exceptions for judges, which the petitioner wanted the court to find.<sup>97</sup> Since Article II permits the President to make recess appointments for judges, “it necessarily follows that such judicial officers may exercise the power granted to Article III courts,” including criminal trials.<sup>98</sup> As to the charge that Presidents may not use the recess appointment power to fill vacancies that arise while the Senate is in session, the court held that this interpretation “would create Executive paralysis and do violence to the orderly functioning of our complex government.”<sup>99</sup> The one law review article written in response to this decision was critical of the court’s analysis.<sup>100</sup>

## **The Woodley Case**

President Carter nominated Walter Heen for a district judgeship in Hawaii on February 28, 1980. On September 25, the Senate Judiciary Committee began confirmation hearings, but no vote had been taken when the Senate recessed on December 16 at the end of the 96th Congress. On December 31, while the Senate was in recess, Carter made Heen a recess appointee. Carter’s action came almost two months after he lost to Ronald Reagan. A month after the recess appointment, on January 21, 1981, President Reagan withdrew Heen’s nomination and he continued to sit as a district judge until December 16, 1981, when the first session of the 97th Congress ended.

While Judge Heen sat as a recess appointee, Janet Woodley was indicted on a drug charge and filed motions to suppress evidence allegedly obtained in violation of the Fourth Amendment. On November 16, 1981, Judge Heen denied the suppression motions and presided over a trial at which Woodley was found guilty. Woodley challenged Heen’s authority to decide these matters as a recess appointee.

In 1983, a three-judge panel of the Ninth Circuit decided this case by analyzing the inherent tension between the President’s Article II recess appointment powers and

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<sup>96</sup> United States v. Allocco, 305 F.2d 704, 706 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963).

<sup>97</sup> Id. at 708-09.

<sup>98</sup> Id. at 709.

<sup>99</sup> Id. at 712.

<sup>100</sup> John S. Castellano, “A New Look at Recess Appointments to the Federal Judiciary—*United States v. Allocco*,” 12 Cath. U. L. Rev. 29 (1963).

the attributes of judicial independence incorporated into Article III. It held that “only those judges enjoying article III protections may exercise the judicial power of the United States.”<sup>101</sup> Only an “even more explicit constitutional provision” could override the values in Article III, and the general language of the recess appointment clause, which “does not mention the judicial branch at all,” was insufficient to overcome the command of Article III.<sup>102</sup> The court’s review of the records and writings of the constitutional period highlighted the importance of judicial independence to the framers.<sup>103</sup> It also noted that decisions by the Supreme Court have emphasized the importance of an independent judiciary.<sup>104</sup>

The Justice Department argued that the “long and accepted” practice of the President making recess appointments to Article III courts had created an “historical consensus.” The court acknowledged that there had been 283 previous recess appointments to the federal bench—six of them to the Supreme Court—and yet also stated that the practice “fell into disuse a generation ago.” Judge Heen’s appointment in 1980 “was the only recess appointment in the past twenty years.”<sup>105</sup> Although both the legislative and executive branches had long accepted the President’s power to make recess appointments to the federal bench, and officials in the two branches swear to uphold the Constitution, “the courts alone are the final arbiters of its meaning.”<sup>106</sup>

The Ninth Circuit reviewed a number of decisions that had given great weight to historical practice and the constitutional interpretations reached by the political branches. However, it said that that line of reasoning no longer “represents the thinking of the Court,” especially after *INS v. Chadha* (1983) struck down a 50-year experiment with the legislative veto.<sup>107</sup> Following the reasoning in *Chadha*, which ruled that convenience and efficiency were subordinate values to constitutional commands, the court concluded that to whatever degree recess appointments to judgeships contribute to judicial efficiency, they “offend the explicit and unambiguous command of article III that the judicial power be exercised only by those enjoying life tenure and protection against diminution of compensation.”<sup>108</sup>

A majority of the Ninth Circuit voted to rehear the case en banc.<sup>109</sup> In 1985, the full court held that the President may constitutionally confer temporary federal judicial commissions during a recess of the Senate. Judge Heen could therefore constitutionally preside over a criminal trial. The court, divided 7 to 4, decided that

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<sup>101</sup> *United States v. Woodley*, 726 F.2d 1328, 1330 (9th Cir. 1983).

<sup>102</sup> *Id.* at 1331.

<sup>103</sup> *Id.* at 1331-32.

<sup>104</sup> *Id.* at 1334-35.

<sup>105</sup> *Id.* at 1336.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1337.

<sup>108</sup> *Id.* at 1338.

<sup>109</sup> *United States v. Woodley*, 732 F.2d 111 (9th Cir. 1984).

there is “no reason to favor one Article over the other.”<sup>110</sup> Article II explicitly gave the President the power to fill “all” vacancies during a Senate recess, and there was “no basis upon which to carve out an exception from the recess power for federal judges.”<sup>111</sup> The court noted that Presidents had made approximately 300 judicial recess appointments and that Congress “has consistently confirmed judicial recess appointees without dissent.”<sup>112</sup> The court further noted that Rutledge was not confirmed, but the Senate rejected him not because he was a recess appointee but because of his speeches against the Jay Treaty.<sup>113</sup>

As to the importance of *Chadha*, the court noted that the legislative veto is “a recent practice, barely 50 years old,” whereas recess appointments to federal courts “reach back to the days of the Framers.”<sup>114</sup> Considerable weight is given to unbroken practices “acquiesced in by the Framers of the Constitution when they were participating in public affairs.”<sup>115</sup> Since a recess appointee lacks life tenure and is not protected by salary diminution, the individual “is in theory subject to greater political pressure than a judge whose nomination has been confirmed.”<sup>116</sup> However, “[e]ven viewing the recess clause as an unwise constitutional provision, it is not for this court to redraft the Constitution. Changes in that great document must come through constitutional amendment, not through judicial reform based on policy arguments.”<sup>117</sup>

Judge Heen served out his recess appointment, which lasted until the end of the first session of the 97th Congress. President Reagan did not nominate him to a lifetime appointment. Heen left the federal court to sit on the Hawaii State Intermediary Court of Appeals.<sup>118</sup> Because of Carter’s defeat by Reagan, Heen said he knew his service on the federal bench would be short-term. He concluded that the recess appointment in his case was “an exercise in futility [because] you know you’re not going to be around.”<sup>119</sup>

Four law review articles analyzed the *Woodley* case. Two of the articles, responding to the panel decision, argued that recess appointments to federal courts are a valid exception to the Article III requirements for life tenure and no-

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<sup>110</sup> *United States v. Woodley*, 751 F.2d 1008, 1010 (9th Cir. 1985), cert. denied, 475 U.S. 1048 (1986).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1011.

<sup>113</sup> *Id.* at 1010, n.5.

<sup>114</sup> *Id.* at 1011.

<sup>115</sup> *Id.* at 1012.

<sup>116</sup> *Id.* at 1014.

<sup>117</sup> *Id.*

<sup>118</sup> “U.S. Judge’s Recess Appointment Ruled Illegal,” *National Law Journal*, December 26, 1983, at 15.

<sup>119</sup> “Recess Appointee Says It’s Not a Great Idea,” *Washington Post*, November 8, 1999, at A19.



diminution.<sup>120</sup> The other two, written after the en banc ruling, concluded that recess appointments to the federal judiciary contravene Article III requirements and argued that recess appointees may not exercise Article III powers.<sup>121</sup>

However one analyzes the decision of the Ninth Circuit, sitting en banc, it stands only for the proposition that if the President and the Senate agree to recess appointments for federal courts, the appointments are not constitutionally invalid. The decision does not mean that the President and the Senate are forced in any way to accept recess appointments to federal courts as the preferred or even acceptable course. The two political branches could decide, on either political or constitutional grounds, that the recess appointment power should not be applied to the judiciary.

## Gregory's Appointment

On the last day of the 106th Congress, December 15, 2000, with the Senate about to adjourn sine die, Senate Majority Leader Trent Lott voiced concern about the President's use of recess appointments, "especially appointments to the Federal judiciary."<sup>122</sup> Senator Byrd cautioned that the Recess Clause "is not put in there to enable any President, Republican or Democrat, to play games with the Senate, or to attempt to do a one-upmanship simply because the Senate is out of session." He said he "especially hope[d]" that the Administration would not attempt "to fill a Federal judgeship during the recess of the Senate," and that he would not support "any administration, Democratic or Republican, that attempts to fill Federal judgeships while the Senate is in recess." Lott added that he had not been notified of any recess appointments "or any Federal judicial appointment during this recess period." He agreed with Byrd that "any appointment of a Federal judge during a recess should be opposed." In recalling the Eisenhower recess appointments to the federal courts, Lott said that "was a mistake then, and it would be one now."<sup>123</sup>

President Clinton had nominated Roger L. Gregory to the Fourth Circuit on June 30, 2000.<sup>124</sup> On December 27, he announced Gregory's recess appointment, the first time since 1980 that a President had named an Article III judge as a recess appointee. Clinton offered several reasons for his decision. He said that the U.S. Judicial Conference had declared the seat "a judicial emergency" and that it had been vacant

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<sup>120</sup> Thomas A. Curtis, "Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation," 84 Colum. L. Rev. 1758 (1984); Joann Gaona, "Recess Appointment Power—Exception to or Violation of Article III," 1984 Ariz. St. L. J. 783 (1984).

<sup>121</sup> Paul Ferris Solomon, "Answering the Unasked Question: Can Recess Appointees Constitutionally Exercise the Judicial Power of the United States?," 54 Cinc. L. Rev. 631 (1985); Virginia L. Richards, "Temporary Appointments to the Federal Judiciary: Article II Judges?," 60 N.Y.U. L. Rev. 702 (1985).

<sup>122</sup> 146 Cong. Rec. S11833 (daily ed. December 15, 2000).

<sup>123</sup> Id. at S11834.

<sup>124</sup> 36 Weekly Comp. Pres. Doc. 1564 (2000).

for more than a decade. He regarded it as “unconscionable that the fourth circuit, with the largest African-American population of any circuit in our Nation, has never had an African-American appellate judge.” Having offered nominations in the past for this vacancy, without obtaining confirmation from the Senate, he decided that a recess appointment was justified.<sup>125</sup> Clinton said he had “tried for 5 years to put an African-American on the fourth circuit.”<sup>126</sup>

Press reports put the Gregory recess appointment in a larger context. Newspaper accounts described efforts by the Clinton White House to “put the Senate’s record on black judges in play in the midst of controversy over President-elect Bush’s attorney general nominee, Sen. John D. Ashcroft, who has been roundly condemned by civil rights groups for torpedoing the nomination of another African American judicial candidate, Missouri Supreme Court Justice Ronnie White.”<sup>127</sup> Other reports suggest that the decision to put Gregory on the court as a recess appointee was made before Election Day.<sup>128</sup> Rep. James E. Clyburn, chairman of the Congressional Black Caucus, stated that if Senate Republicans tried to remove Gregory, racial representation on the federal bench “would be an even bigger issue in the mid-term elections than it already is.”<sup>129</sup> Another news story interpreted the recess appointment as not only placing the first black on the Fourth Circuit but “one also carefully calculated to create political difficulties for the Republican Party.”<sup>130</sup>

Senator Inhofe, announcing that he would block any effort to confirm Gregory for a lifetime appointment, called it “outrageously inappropriate for any president to fill a federal judgeship through a recess appointment in a deliberate way to bypass the Senate.”<sup>131</sup> It was reported that Senator Lott had told Clinton he would oppose any recess appointments of judges.<sup>132</sup>

On January 3, 2001, President Clinton renominated Gregory for the 107th Congress.<sup>133</sup> On March 19, President George W. Bush withdrew the names of 10 nominees for federal judgeships, including Gregory.<sup>134</sup> In the meantime, the Senate

<sup>125</sup> *Id.* at 3180.

<sup>126</sup> *Id.* at 3182.

<sup>127</sup> “Clinton Names Black Judge to Appeals Court,” *Washington Post*, December 28, 2000, at A8.

<sup>128</sup> “4th Circuit Surprise,” *Legal Times*, January 1, 2001, at 6.

<sup>129</sup> “Clinton Names Black Judge to Appeals Court,” *Washington Post*, December 28, 2000, at A8.

<sup>130</sup> “Clinton Names A Black Judge; Skirts Congress,” *New York Times*, December 28, 2000, at A1.

<sup>131</sup> “Senator Vows He Will Fight Clinton’s Judicial Selection,” *New York Times*, December 29, 2000, at A15.

<sup>132</sup> *Id.*

<sup>133</sup> 37 *Weekly Comp. Pres. Doc.* 4-5 (2001).

<sup>134</sup> 37 *Weekly Comp. Pres. Doc.* 503 (2001); “ABA’s Role in Vetting U.S. Judges Is (continued...)”

and the White House negotiated over the procedures for acting on judicial nominees. By early May, it was reported that Senate Democrats said they would not agree to confirmation votes for Theodore B. Olson as Solicitor General and Larry Thompson as Deputy Attorney General unless the Republicans restored the right of individual Senators to block judicial nominations from their home states. They also said they would block action on any judicial nomination until the issue was resolved.<sup>135</sup> In what was interpreted as a conciliatory move, President Bush announced eleven nominations for the federal judiciary on May 9, including the name of Roger Gregory for a lifetime appointment to the Fourth Circuit.<sup>136</sup>

The Senate Judiciary Committee cleared Gregory on July 19 by a vote of 19 to 0.<sup>137</sup> On the following day, the Senate approved Gregory 93 to 1, the sole negative vote coming from Senator Lott.<sup>138</sup> Although there was no floor statement by Senator Lott, the media quoted his spokesman saying that his opposition to Gregory was “an institutional decision” designed to protect Senate prerogatives and emphasize his position that “any appointment of federal judges during a recess should be opposed.”<sup>139</sup> During the floor debate, Senator George Allen spoke in favor of Gregory but did not want his support interpreted as condoning “the former President’s political manipulations” and the “past procedural aggravation.”<sup>140</sup>

## Conclusions

Despite litigation in *Allocco* and *Woodley*, the President’s use of recess appointments for federal judges remains an unsettled constitutional issue. The President’s appointment powers under Article II are in tension with the Senate’s confirmation role and with the constitutional guarantees to federal judges under Article III. The issues identified by Senator Hart in his 1960 resolution are still with us. Individuals placed on Article III courts for an interim period lack the independence of judges who are given life tenure and are protected against diminution of salary. Recess appointees weaken the advice and consent role of the Senate and, some believe, diminish the constitutional protections accorded to litigants.

As a result of the controversy over the Eisenhower recess appointments of Warren, Brennan, and Stewart, there appears to be a political agreement that the

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<sup>134</sup> (...continued)

Reviewed,” Washington Post, March 20, 2001, at A1.

<sup>135</sup> “Democrats Block Picks for 2 Justice Posts,” Washington Post, May 4, 2001, at A10.

<sup>136</sup> 37 Weekly Comp. Pres. Doc. 724-25 (2001); “Bush Will Nominate 11 as U.S. Judges,” Washington Post, May 9, 2001, at A1.

<sup>137</sup> “Panel Clears Judge Gregory, Two Others,” Washington Post, July 20, 2001, at A2.

<sup>138</sup> 147 Cong. Rec. S7992 (daily ed. July 20, 2001).

<sup>139</sup> “Senators Confirm 3 Judges, Including Once-Stalled Black,” New York Times, July 21, 2001, at A28.

<sup>140</sup> 147 Cong. Rec. S7991 (daily ed. July 20, 2001).

President should not use recess appointment powers for Justices of the Supreme Court. After President Carter's appointment of Judge Heen, there seemed to be a similar agreement for lower court judges. Because of President Clinton's appointment of Judge Gregory, the dispute over recess appointments for district courts and the federal circuits has been rekindled.

The Senate can issue sense-of-the-Senate resolutions and other non-binding statements, but it cannot prevent the President from invoking the recess appointment power to appoint federal judges. However, the issue is as much subject to political checks and understandings as it is to judicial rulings. The Senate always has the option of making it clear that such interim appointments would be defeated overwhelmingly when the individual is nominated for a lifetime appointment. Should it do so, it would give notice that such appointees could expect limited tenure. Presidents would then decide whether it is worth the laborious process of completing background checks on nominees and interviewing them, merely to put judges on the court for brief periods.

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