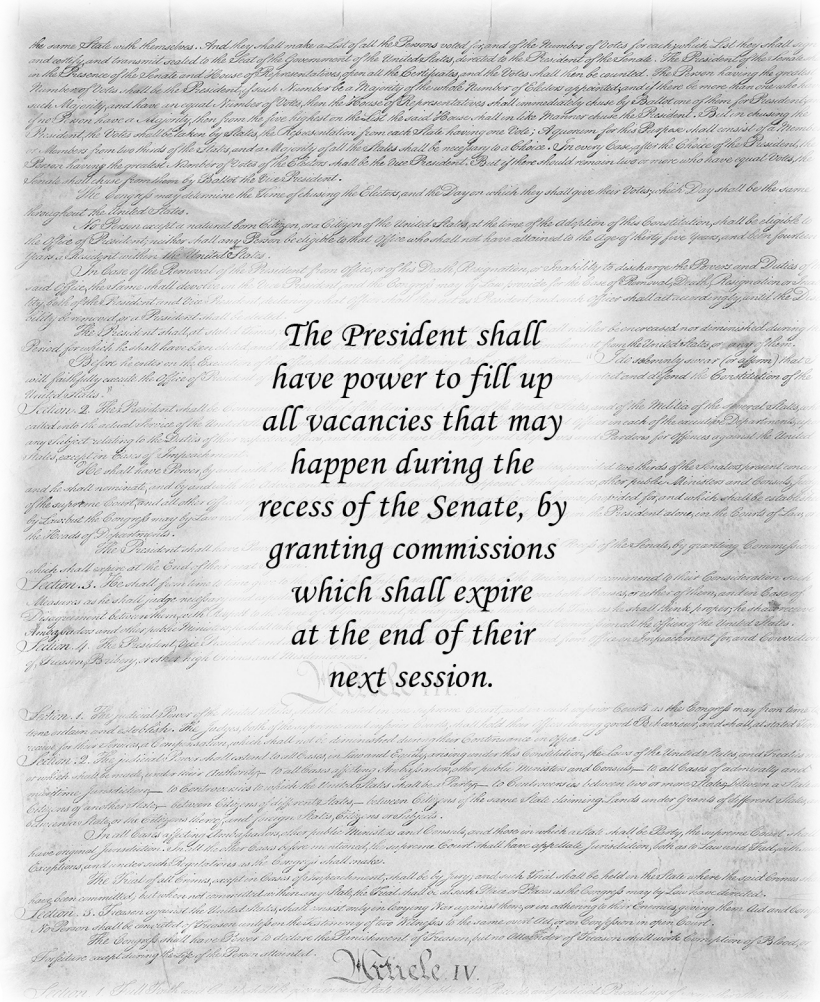
Cases that Shaped the Federal Courts

United States v. Allocco

1962



Federal Judicial Center
2020

Central Question

Were presidential recess appointments to the federal courts constitutional?

Historical Context

Article II, Section 2 of the U.S. Constitution provided the President with the power to appoint federal judges "by and with the Advice and Consent of the Senate." An additional clause added to the appointment power, however, by permitting the President "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." The Recess Appointment Clause was not the subject of significant debate during the drafting of the Constitution, so the records of the Constitutional Convention do not reveal exactly how the framers intended the clause to be used. There is good reason to believe, however, that the purpose of the clause was to ensure the orderly functioning of the federal government during times when the Senate was not in session and therefore unable to exercise its constitutional role in the appointment process. In *Federalist* no. 67, Alexander Hamilton described the clause as "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 not have been proper, noted Hamilton, to require the Senate to remain in session at all times for the appointment of officers.

Since 1789, Presidents have used the recess appointment power to appoint federal judges over 300 times, including 12 times for justices of the Supreme Court. (The vast majority of these judges later received regular appointments by presidential nomination and Senate confirmation.) There has always been an inherent tension between Article III of the Constitution, which provides that judges exercising the judicial power of the United States shall remain in office "during good behavior," and the Recess Appointment Clause, which mandates that appointments made without the advice and consent of the Senate be temporary. Dwight Eisenhower's recess appointments of Earl Warren, William Brennan, and Potter Stewart between 1953 and 1958 were the last made to the Supreme Court; in 1960, the Senate passed a resolution expressing its disapproval of such appointments. Recess appointments to the lower courts have fallen into disfavor as well, with only four occurring since 1964.

Legal Debates Before *Allocco*

Although the temporary nature of appointments made pursuant to the Recess Appointment Clause appears to conflict with the tenure during good behavior for federal judges

provided for in Article III, legal debates over recess appointments prior to the middle of the twentieth century did not focus on this potential conundrum. Instead, disagreements arose over the meaning of two specific terms used in the clause. First, did a vacancy "happen" only when it first occurred, or for as long as it existed? If the former interpretation were adopted, the President could make recess appointments only to fill vacancies that first occurred during a recess of the Senate, and not those simply existing during a recess. Second, there were two types of congressional recesses. One, known as an "intersession" recess, occurred during the break between the end of one session of Congress and the beginning of another (a Congress consists of two sessions, each lasting approximately a year). The second, called an "intrasession" recess, was a break that took place during a congressional session. It was not clear whether the Recess Appointment Clause applied to both intersession and intrasession recesses.

Attorney General William Wirt was the first official called upon to answer the question of what constituted a vacancy for purposes of the Recess Appointment Clause. (Section 35 of the Judiciary Act of 1789 empowered the Attorney General to give opinions on matters of law when requested to do so by the President or the head of an executive department.) In his 1823 opinion, Wirt interpreted the clause to apply to any vacancy existing during a recess of the Senate, rejecting the narrower view that would have limited recess appointments to vacancies first opening during a recess. "[I]t seems to me perfectly immaterial when the vacancy first arose," he wrote, "for, whether it arose during the session of the senate or during their recess, it equally requires to be filled." The opinions of succeeding Attorneys General on the matter concurred with Wirt's. In 1880, the U.S. Circuit Court for the Northern District of Georgia cited these opinions with approval in its ruling in *In re Farrow*, a dispute regarding the office of U.S. Attorney for the Districts of Georgia.

The question of what constitutes a "recess" for purposes of the clause was not addressed until 1901, when Attorney General Philander Knox expressed the view that the President could make recess appointments only between Senate sessions, and not during adjournments within a session. In 1921, however, Attorney General Harry Daugherty ruled that the Recess Appointment Clause applied to an intrasession recess of approximately a month, explaining that the prior view was overly technical and did not serve the practical purpose of the recess appointment power. Neither that opinion, nor a concurring opinion in 1960, provided a precise definition of how long an intrasession adjournment must last in order to permit the President to make a recess appointment.

The Case

On October 20, 1955, a jury in the U.S. District Court for the Southern District of New York convicted Dominic Allocco of conspiracy and federal narcotics violations. The trial

judge, John M. Cashin, sentenced Allocco to ten years in prison. Allocco appealed, and the U.S. Court of Appeals for the Second Circuit affirmed the conviction. After both the district court and the court of appeals denied his several motions to have his sentence stayed or reduced, Allocco attempted to take his case to the Supreme Court of the United States, which declined to hear it.

Allocco then filed a motion with the district court to have his conviction overturned on the grounds that Judge Cashin was a recess appointee at the time he presided over the trial, and had therefore been without constitutional authority to hear the case. The motion rested on two alternative arguments: first, that Cashin lacked the tenure during good behavior prescribed by Article III of the U.S. Constitution and therefore could not exercise the judicial power of the United States; and second, that Cashin's recess appointment was invalid because the vacancy he was appointed to fill first arose during a Senate session rather than a recess. (Cashin's predecessor, Judge Samuel Kaufman, retired on July 31, 1955, and the Senate adjourned two days later.)

U.S. District Judge Richard H. Levet denied Allocco's motion on December 1, 1961. Most of Levet's opinion focused on the long and unbroken line of Attorney General opinions holding that a vacancy need not first arise during a recess of the Senate in order to be filled by a recess appointment. At the very end of his opinion, the judge found it to be "clear" that a recess appointee could exercise judicial power under Article III, noting that if it were otherwise, "no purpose would be served" by the appointment of judges under the Recess Appointment Clause in Article II. Allocco appealed Levet's decision to the U.S. Court of Appeals for the Second Circuit.

The Ruling of the Court of Appeals

A three-judge panel of the U.S. Court of Appeals for the Second Circuit, consisting of Judges Charles E. Clark, Irving R. Kaufman, and Paul R. Hays, heard the case. In a unanimous opinion authored by Judge Kaufman and issued July 10, 1962, the court ruled against Allocco, affirming the district court's rejection of each of his two arguments. Like Judge Levet of the district court, the court of appeals dispensed fairly quickly with the argument that the President was not entitled to make temporary appointments of federal judges. The opinion pointed to the plain language of the Recess Appointment Clause referring to "all" vacancies. The only sensible reading of "vacancies" in this context, wrote Kaufman, encompassed vacancies in all of the positions covered by the preceding clause regarding presidential appointments by and with the advice and consent of the Senate. There was no basis, therefore, "to find an implied exception" in this language "to exclude vacancies in judicial offices." Judge Kaufman also relied on the long history of judicial recess appointments—including George Washington's 1795 recess appointment of John

Rutledge as Chief Justice of the Supreme Court—and the fact that the President's power in this regard had never before been challenged. Even the U.S. Senate's 1960 resolution expressing disapproval of recess appointments to the Supreme Court had not denied the President's constitutional authority to make such appointments. Having found presidential recess appointments of federal judges to be valid, the court held that "it necessarily follows that such judicial officers may exercise the power granted to Article III courts."

The court turned next to Allocco's argument that a vacancy could "happen" in the context of the Recess Appointment Clause only if it first opened while the Senate was in recess. Kaufman's opinion stressed the impracticality of such an interpretation, pointing out that if it were accepted, a judicial position that became vacant on the day the Senate adjourned would have to remain vacant until the Senate once again convened. The same would be true of vacancies in cabinet positions, ambassadorships, and other important government offices. "It is inconceivable," wrote Kaufman, "that the drafters of the Constitution intended to create such a manifestly undesirable situation." Such a result was particularly unworkable in an era in which the Senate's process of evaluating and confirming a nominee could take several months, which would leave crucial positions unfilled for long periods of time. Allocco's reading of the recess appointment clause, concluded the court, "would create Executive paralysis and do violence to the orderly functioning of our complex government." In further support of its ruling, the court cited the long line of Attorney General opinions stretching back to 1823, all of which had come to the same conclusion. As a result, the court held that Judge Cashin was properly appointed a U.S. district judge at the time of Allocco's trial, and was constitutionally empowered to preside over it. Allocco's conviction was therefore affirmed. In 1963, the Supreme Court once again declined to hear the case, denying Allocco's petition for a writ of certiorari.

Aftermath and Legacy

The *Allocco* case provided some resolution of the central legal questions surrounding recess appointments of federal judges, but the fact that the Supreme Court did not hear the case left the door open for courts in other judicial circuits to rule differently should additional challenges to such appointments arise. Shortly after the case concluded, judicial recess appointments fell into disfavor; Presidents John F. Kennedy and Lyndon B. Johnson made a total of seven such appointments between October 1962 and January 1964, but then the practice nearly ceased entirely. The next judicial recess appointment—Jimmy Carter's placement of Walter M. Heen on the U.S. District Court for the District of Hawaii just before leaving office in January 1981—once again resulted in litigation.

In *U.S. v. Woodley*, the defendant was convicted of narcotics offenses in a bench trial before Judge Heen and appealed her conviction to the U.S. Court of Appeals for the

Ninth Circuit. Although Woodley did not raise the issue in her appeal, a three-judge panel of the court of appeals ruled in 1983 that as a recess appointee, Judge Heen was not able to exercise the judicial power of the United States under Article III. The court therefore reversed the conviction and remanded the case to the district court for a new trial. The opinion, written by Judge William A. Norris, expressly rejected the Second Circuit's holding in *Allocco*. The panel reasoned that while the framers' intent in drafting the Recess Appointment Clause was unclear, the specific language of Article III requiring tenure during good behavior for federal judges took precedence over the vague and general language in Article II regarding recess appointments.

In April 1984, before the case could be retried, a majority of the Ninth Circuit judges voted to rehear the case en banc (before the entire court rather than a three-judge panel). After rehearing, the court in January 1985 voted 7–4 to overturn the panel's ruling that Judge Heen lacked constitutional authority to hear the case. In an opinion by Judge Robert R. Beezer, the court disagreed with the panel's conclusion that the language of Article III regarding the tenure of federal judges was more specific than, and therefore took precedence over, the language of Article II addressing recess appointments. The court also accorded the long history of judicial recess appointments more weight than the panel had, particularly because the practice had existed since the founding of the nation "and was acquiesced in by the Framers of the Constitution when they were participating in public affairs." Regardless of how one viewed the Recess Appointment Clause, concluded the court, "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." As with *Allocco*, the Supreme Court declined to review the case.

After *Woodley*, no further judicial recess appointments took place until 2000, when President Bill Clinton appointed Roger L. Gregory to the U.S. Court of Appeals for the Fourth Circuit. In 2004, President George W. Bush made recess appointments of Charles W. Pickering, Sr., and William H. Pryor, Jr., to the Fifth and Eleventh Circuits, respectively. Pryor's appointment resulted in additional litigation. In *Evans v. Stephens*, the plaintiff in a civil rights case sought to disqualify Judge Pryor from participating in the court's en banc rehearing, arguing that his recess appointment was invalid. With Judge Pryor and another judge recusing themselves from considering the question, the court voted 8–2 to deny the plaintiff's disqualification motion, electing to follow the decisions of other circuits in *Allocco* and *Woodley*. One of the dissenting judges, Charles R. Wilson, did not assert an opinion on the merits of the motion, stating that he believed it was improper for the court to rule on the qualification of one of its members, and that the question should have been put before the Supreme Court instead. In 2005, the Supreme Court denied certiorari. Justice John Paul Stevens took care to emphasize that the Court's refusal to hear

the case should not be taken as "a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as vacancies on this Court, with appointments made absent consent of the Senate during short intrasession 'recesses.'"

In recent years, the Senate has frequently held pro forma sessions—brief meetings that may be held by one presiding senator and at which no business is transacted—which have prevented the occurrence of an intrasession recess that would enable the President to make recess appointments. In 2014, the Supreme Court ruled in *N.L.R.B. v. Noel Canning* that pro forma sessions cannot be ignored in calculating the length of a recess and that "for purposes of the Recess Appointments Clause, the Senate is in session when it says it is." Taking pro forma sessions into account, the recess appointments at issue were made during a recess of three days, which the Court determined to be too short to make the appointments valid. Any recess of less than ten days, the Court held, would be "presumptively too short to fall within the [Recess Appointments] Clause."

Discussion Questions

- Why do you think the framers of the Constitution provided for the appointment of federal judges and certain other government officials by presidential nomination and Senate confirmation?
- What is judicial independence and how does the Constitution seek to protect it?
- Why might some find it problematic for federal judges to serve under temporary appointments?
- Has the need for the Recess Appointment Clause changed over time? If so, should courts take that into account when analyzing the constitutionality of recess appointments of federal judges?
- Should the Senate be able to stop the President from making recess appointments entirely? Why or why not?

Documents

U.S. House Committee on the Judiciary, Recess Appointments of Federal Judges, January 19, 1959

After President Dwight Eisenhower made three presidential recess appointments to the Supreme Court between 1953 and 1958, the U.S. House Committee on the Judiciary issued a report analyzing the constitutionality of such appointments. While the committee acknowledged objections to the practice by some legal scholars, it concluded that a long history of usage had established its validity.

Is there a constitutional conflict between the President's power to make recess appointments to Federal judgeships and the provision for tenure during good behavior conferred on judges?

Upon the appointment of Earl Warren to be Chief Justice of the United States, Prof. Henry M. Hart, Jr., of the Harvard Law School, wrote a letter to the Harvard Crimson. Professor Hart said that for the appointee to take his seat immediately and participate in and decide cases before being nominated and confirmed by the Senate would—

> in [his] judgment violate the spirit of the Constitution, and possibly also its letter. (Letter reprinted in *The Harvard Law School Record*, vol. 17, No. 2, October 8, 1953, p. 2.)

He pointed out that such a course must necessarily weaken the spirit of independence, no matter how great the integrity of the individual, because the actions of the judge before confirmation will be subject to unusual scrutiny and may be reviewed in "the raking fire of confirmation hearings." Professor Hart's conclusion was that "The President ought not to subject a new appointee to [such a] dilemma…." And in the case of Chief Justice Warren he advocated the President calling a special session of the Senate to act on the nomination.

This same issue of the *Harvard Law School Record* also quoted Prof. Paul A. Freund as expressing—

> misgivings over the recess appointments, which has a Federal judge sitting as he [Freund] termed it, "with one eye over his shoulder on Congress."

Other comments were included, the weight of them questioning the propriety of such a recess appointment. There can be no doubt that these distinguished legal scholars raised a fundamental question of constitutional practice, a question oddly enough, which never before had commended itself for serious discussion….

One course of reasoning that appears to avoid a constitutional conflict is the distinction between the office and the vacancy made by Attorney General Stanberry.… It was his claim that the President cannot fill the office without the concurrence of the Senate; consequently he only fills the vacancy existing in the office in the recess of the Senate. And that a judge appointed to fill a vacancy in an office holds only "for a fraction of time." On the basis of the principle underlying the provision for life tenure, Attorney General Stanberry's opinion appears to be a solecism. The reasoning must proceed in this manner: (1) a judge appointed in the recess is not appointed to the office of judge but only to the vacancy in the office, (2) since he has not been appointed to the office, but only to the vacancy, there is no constitutional necessity to confer on him tenure during good behavior. Such a course, in many instances, renders nugatory the high constitutional principle of an independent judiciary. Constitutional—

> principles are of equal dignity and … must [not] be so enforced as to nullify or substantially impair [an] other (Dick v. United States, 208 U.S. 340, 353 (1908))….

If the question were between two fundamental constitutional principles, then, indeed, might the choice be a difficult one. But can the recess appointment power of the President, important as it is, be clothed with the dignity of a "fundamental constitutional principle"? This power of the President, incorporated into the Constitution in article II, section 2, clause 3, was not mentioned in the Federal Convention until September 7, 1787. On that day, according to Madison's notes, the clause was agreed to unanimously, and apparently without debate, on motion of Richard Dobbs Spaight of North Carolina. It appears to be a device of mere convenience and expediency, one necessary to the fulfillment of executive functions; and this has been the reason generally advanced for the expansion of the power in the line of opinions by the Attorney General.

The distinction attempted by Attorney General Stanberry between the office and the vacancy standing alone may not be completely persuasive. A fundamental rule of construction is that where the words of a provision are clear and unambiguous, they must be held to mean what they clearly express unless a different inference from some other provision is irresistible.…

Applied to the problem at hand, article II, section 2, clause 3, confers on the President a power to make appointments in the recess of the Senate. The language is clear and distinct. That article III, section 1—in which is incorporated the principle of an independent judiciary—necessarily implies a restriction need not follow.… The provisions would seem reconcilable if clause 3 is merely a device of convenience and expediency for filling vacancies "temporarily." …

There is evidence to support the conclusion that neither the spirit nor the letter of [the] Constitution has been, or is now being, violated by judicial recess appointments. Certainly the repeated appointment in the recess of the Senate of Justices to the Supreme Court from the very first years of the Court, and the recent reiteration of this practice in the appointments of Chief Justice Warren and Justices Brennan and Stewart must count considerably toward the establishment of a precedent.…

The fact that four of the recess appointments to the Supreme Court took place in the first 10 years under the Constitution, and that 9 out of a total of 15 [the correct number is 12] such appointments were made in the first 62 years, lends considerable weight to a conclusion that by early and frequent usage the power to make such appointments was assumed by the executive and acquiesced in by Congress and the people.… But what of the relative disuse of the power to make such recess judicial appointments, in the case of Supreme Court Justices, between 1851 and 1953, when only three were made? Any conscious or unconscious abdication of the practice would seem to have been obviated by the reinstitution of the practice in 1953, since this apparently was unaccompanied by any senatorial objection or objection from any other important authoritative source.

Thus it appears that long, though not continuous usage has established the practice notwithstanding the constitutional conflict, and further, that the conflict is more apparent than real.

Document Source: U.S. House of Representatives, Committee on the Judiciary, *Recess Appointments of Federal Judges*, Committee Print, 86th Cong., 1st sess., January 19, 1959, at 8–10.

U.S. Senate, Resolution Regarding Recess Appointments to the Supreme Court, August 29, 1960

Although neither house of Congress asserted that recess appointments to the federal bench violated the Constitution, the Senate issued a resolution in 1960 disfavoring such appointments to the Supreme Court. The resolution was motivated by concerns that having justices sit on cases prior to Senate confirmation would impair judicial independence and threaten to complicate the confirmation process.

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 deliberations; and

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.

Document Source: *Congressional Record*, 86th Cong., 2nd sess., 1960, 106, pt. 14:18145.

U.S. Court of Appeals for the Second Circuit, Opinion in *U.S. v. Allocco*, July 10, 1962

In its opinion in the Allocco *case, the Second Circuit found that recess appointments to the federal judiciary were valid and that judges holding such appointments could exercise all the powers of an Article III judge. In making this finding, the court relied in part on the fact that Congress had never objected to the practice on constitutional grounds.*

[P]etitioner initially contends that the President has no power to appoint so-called "temporary" judges, i.e., judges who may take office although they do not have life tenure. In a closely related argument, petitioner also contends that even if the President has power to make interim judicial appointments, judges serving under recess commissions may not preside over criminal trials.…

The only reason given for this extraordinary proposition is that Article III, which in effect provides for life tenure for federal judges who have been appointed to exercise the judicial power created therein, does not permit an "exception" for judges appointed under the recess power of Article II. This argument appears to have been rejected by Hamilton in

the Federalist No. 78 [in which Hamilton described "the mode of appointing the judges" as "the same with that of appointing the officers of the Union in general"]. It seems not to have occurred to Congress in 1795 when Chief Justice John Rutledge was appointed by President Washington under the recess power, although the Senate later refused to confirm his nomination.… Nor has petitioner directed our attention to any instance subsequent to 1795 when the President's power to appoint judges in this manner was challenged. The practice has become so common that recently the Chairman of the House Committee on the Judiciary estimated that approximately 50 federal judges were sitting under recess appointments.… And when the Senate, expressing its special interest in the appointment of Supreme Court Justices, recommended that recess appointments to the highest tribunal be made sparingly … it did not challenge the President's power to make such appointments.…

Since we hold that Article II permits the President to appoint Justices of the Supreme Court and judges of inferior courts to serve for a limited period, it necessarily follows that such judicial officers may exercise the power granted to Article III courts.…

Petitioner's argument, in the main, is that even if the President may use the recess power to appoint so-called Article III judges, he may not use that power to fill vacancies which arise while the Senate is in session.…

Petitioner argues forcefully that the word "happen" cannot easily be understood to mean anything but "fall open." An event "happens," and, therefore, he says the vacancy filled by Judge Cashin should be considered to have "happened" when Judge Kaufman's retirement took effect. But "the logic of words should yield to the logic of realities." If we accept petitioner's definition, we must be prepared to accept his conclusion that judicial offices which are vacant on the day the Senate adjourns must remain vacant until the Senate reconvenes and has the opportunity to fill them.…

It is inconceivable that the drafters of the Constitution intended to create such a manifestly undesirable situation. If we were to adopt the petitioner's interpretation, by reading the word "happened" as if it is suspended in space without any history, context, or purpose, we would frustrate the commendable objective sought by the drafters. . . .

We believe that the Government's interpretation of Article II is reasonable, while the petitioner's would create Executive paralysis and do violence to the orderly functioning of our complex government.…

We hold that Judge Cashin was duly appointed a judge of the United States District Court for the Southern District of New York on August 17, 1955, under the power given to the President by Article II, Section 2 of the Constitution, and that Judge Cashin was empowered to preside over petitioner's trial.

Document Source: *United States v. Allocco*, 305 F.2d 704, 708–10, 712, 715 (2d Cir. 1962).

John S. Castellano, *Catholic University Law Review*, 1963

A 1963 comment in the Catholic University Law Review *by law student John Castellano criticized the Second Circuit's* Allocco *decision, calling its treatment of the judicial recess appointment issue superficial. A judge holding office under a temporary appointment, Castellano pointed out, "holds his position at the pleasure of the President," and therefore lacked the judicial independence necessary to make difficult decisions. Moreover, in deciding whether to confirm the judge to a permanent position, the Senate would be evaluating the decisions the judge had made while a recess appointee, further damaging judicial independence.*

In recent years … 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, 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 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 independence as embodied in the Constitution: limited tenure replaces the constitutional specification of "tenure during good behavior," 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.…

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

Allocco … 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, 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 commissions 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:

> 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 office 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]

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….

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 certainly 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 of 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 decisions was motivated by the desire to immunize the recess appointees involved, who had yet to face confirmation, from possible repercussions….

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 a recess appointee a *de jure* or *de facto* judge—or an interloper? 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 to the Bench under color of authority and public acquiescence be sufficient to confer *de facto* or *de jure* status? 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?

Document Source: John S. Castellano, comment, "A New Look at Recess Appointments to the Federal Judiciary—*United States v. Allocco*," *Catholic University Law Review* 12, no. 1 (1963): 30–33, 39–41 (footnotes omitted).

Thomas A. Curtis, *Columbia Law Review*, 1984

In a 1984 piece, Columbia Law School student Thomas Curtis argued in favor of the constitutionality of judicial recess appointments. The long history of the practice, he asserted, was an example of a "structural accommodation" the branches had worked out between themselves as a way to ensure the orderly functioning of government. Such accommodations were occasionally necessary, Curtis explained, because the Constitution could not possibly cover every eventuality, leaving government officials to address some day-to-day issues of interbranch relations on their own.

This Note argues that recess appointments to the federal judiciary constitute a permissible exception to article III's tenure and salary provisions.…

Because evidence of original intent drawn from the text and legislative history is inconclusive, the Note turns to historical practice as a means of resolving the apparent conflict between the two provisions.…

The practice of making recess appointments to the federal judiciary continued and became even more common after 1829. If, as the preceding section has argued, historical practice from 1789 to 1829 is persuasive evidence of the framers' intent that the recess appointments clause extend to judicial vacancies, it seems intuitively reasonable that a continuation of the practice from 1830 to the present should be regarded as even more

persuasive evidence in support of the same interpretation. On the other hand, at some point a practice becomes so far removed in time from the framers that it can no longer supply evidence of their intent. The use of such "later" historical practice in constitutional interpretation therefore cannot rest on a theory of original intent, but must derive legitimacy from some other theory. This section proposes that later historical practice may be accorded interpretive weight when it evidences a "structural accommodation" among the three branches of government regarding the scope and exercise of their respective powers. It argues that courts legitimately may recognize and give effect to a structural accommodation unless the result is independently unconstitutional.…

The Supreme Court has often accorded interpretive weight to later historical practice. In the *Pocket Veto Case*, for example, the Court concluded that the use of pocket vetoes by successive Presidents represented a "long settled and established practice" to which great deference was required, even though the practice had been "unknown in the early history of the Government." In *Dames & Moore v. Regan*, the Court relied on a relatively recent practice of executive claims settlement to uphold the President's power to suspend claims by United States nationals against Iran without the advice and consent of the Senate. Even in cases in which the Court has decided not to follow later historical practice, either because the practice is too weak or because it clearly contradicts some part of the Constitution, the Court has not disputed the general relevance of later historical practice, but merely the relevance of a particular practice to the case at bar.

On what basis can a court legitimately accord interpretive weight to historical practice that does not provide evidence of original intent? *Marbury v. Madison* declares that the judicial function is to exercise independent judgment in cases of constitutional interpretation, which would seem to preclude courts from simply falling in line with any demonstrable historical practice. Yet later historical practice may, in certain kinds of cases, provide evidence of what might be called a "structural accommodation": a longstanding acquiescence by all three branches of government in a practical construction of the Constitution that determines how their respective powers shall be exercised.…

The theoretical basis for this use of later historical practice traces its source to the framers' intent that questions of interbranch relations be worked out in the day-to-day business of running the government. The framers attempted to equip each branch with enough independent powers to ensure its survival, but realized that it was impossible to foresee every eventuality and provide a rule to govern it. Therefore, they entrusted questions of structural accommodation at the margins of power to the branches themselves, to work out over time in accordance with the broad dictates of the constitutional text and structure.…

In determining whether later historical practice evidences a structural accommodation, the most important question in the typical case is what attitude Congress has taken toward the practice. Because the Constitution vests broad powers in Congress, but does not attempt to specify how those powers shall be exercised and which of them may be shared, a practice engaged in by any part of the government is likely to implicate areas that arguably are subject to exclusive congressional control. If Congress has had the power to overturn a practice through legislation, yet has declined to do so, its acquiescence in or approval of the practice strongly implies the existence of a structural accommodation.…

When an historical practice that Congress has not had the unilateral power to change provides evidence of an alleged structural accommodation, past judicial "acquiescence" may be significant. Several Supreme Court opinions suggest that courts can "acquiesce" in an historical practice in a way that strengthens its value as evidence of a structural accommodation. In particular, where courts have been called upon to enforce a practice and have done so, of where they have been free, because a practice involves the structural position of the judicial branch, to challenge on their own motion its constitutionality, but have not done so, the notion of judicial "acquiescence" in the practice appears more defensible. Thus, there will be situations in which it is significant whether courts have objected to an historical practice and, if not, whether they ever have had the opportunity to do so.…

The long and accepted practice of making recess appointments to the federal judiciary from 1830 to 1980 is very persuasive evidence that the three branches of government reached a structural accommodation regarding the scope of the recess appointments clause. Congressional acquiescence in the practice throughout this period, though not dispositive of the existence of a structural accommodation, nonetheless shows that successive generations of political leaders familiar with the day-to-day implementation of the Constitution have assumed that the practice poses no threat to judicial independence. Courts have had formal authority throughout most of this period to raise jurisdictional objections to decisions rendered by recess appointees. Moreover, judges have always been capable of opposing the practice on an individual or collective basis. It seems reasonable to conclude that no court prior to the Woodley court and no individual judges have gone on record as opposing the practice because the federal judiciary as a whole has never considered recess appointments a threat to its independence. This judicial "acquiescence" is further evidence of a structural accommodation.…

This evidence, together with the evidence drawn in the preceding section from early historical practice, strongly supports the constitutionality of recess appointments to the federal judiciary.

Document Source: Thomas A. Curtis, note, "Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation," *Columbia Law Review* 84, no. 7 (November 1984): 1759, 1777–80, 1782–83, 1788, 1790 (footnotes omitted).

Virginia L. Richards, *New York University Law Review*, 1985

Shortly after the Ninth Circuit ruled judicial recess appointments constitutional in Woodley*, New York University law student Virginia Richards authored a law review note critical of the* Allocco *and* Woodley *decisions. By relying on longstanding practice in making their rulings, she argued, the courts were simply acquiescing in the decisions of the other branches of government, thereby abdicating their responsibility as the final arbiters of the constitution.*

Judicial consideration of whether recess appointments to the federal judiciary violate article III's life tenure provision has been minimal. The only two courts to have addressed the question—the Second Circuit in *United States v. Allocco* and the Ninth Circuit in *United States v. Woodley*—concluded that the practice is constitutional.

Although these opinions, particularly those in the en banc decision in *Woodley*, provide insight into the depth and complexity of the direct conflict between the recess appointment clause and the life tenure requirement for federal judges, none adequately perceived the threat of presidential and congressional influence on the judiciary. Rather than considering the comparative values at stake, both the Second and Ninth Circuits placed undue reliance on historical acceptance of recess appointments to the judiciary. Both courts thus found the practice constitutional. Their emphasis on historical practice is not only a misapplication of Supreme Court pronouncements concerning the weight to be given historically accepted practices, but is also antithetical to the judiciary's role in the constitutional structure.…

The Second and Ninth Circuits did no more than follow the lead of the President, and the acquiescence of Congress, in assuming that article II allows the President to appoint temporary federal judges. This acquiescence of lower federal courts to the other branches' apparent positions on a question of constitutional interpretation directly conflicts with Supreme Court precedent.

Seemingly blinded by historical acceptance and a supposition about the efficiency of recess appointments to the bench, the *Allocco* court completely failed to consider the competing values served by the article III protections and the fundamental importance of an independent judiciary. Similarly, the *Woodley* en banc court failed to consider the competing purposes served by articles II and III and treated historical practice as the dispositive factor in its analysis. These serious analytical flaws in both opinions resulted in an abdication of the courts' position as final arbiter of constitutional meaning. Further, the 1962 *Allocco* opinion predated the 1965-1980 recess appointment hiatus, recent Supreme Court opinions that criticize a bare "historical consensus" argument, and other Supreme Court opinions that emphasize the fundamental importance of article III protections. For

these reasons, the court's heavy reliance on historical consensus is of questionable enduring value today.

Although the *Woodley* panel and en banc decisions inquired more extensively into the conflict between articles II and III than had the *Allocco* court, both the Second Circuit and the Ninth Circuit en banc majority summarily dismissed the argument that there is a potential for abuse when judges "serve at the pleasure of the President and the Senate." Yet is was precisely the fear that judges would be subject to political pressure that led the Framers to construct a government in which the judiciary would be insulated from potential coercion. Thus, the fundamental importance of an independent judiciary to our constitutional structure weighs heavily against invoking an almost exclusive reliance on historical consensus to justify giving the recess appointment clause preeminence over article III protections.…

At one time in the nation's history, article II may have guarded against a very real threat of unfilled government offices. But this threat is no longer, if indeed it ever was, of sufficient magnitude to warrant a breach of article III's protections of judicial independence and the separation of powers. The importance of purported efficiency concerns pales in comparison to the constitutional values served by the life tenure provisions of article III. Moreover, a review of the history of recess appointments indicates that article II power has been used in situations in which political purposes could have played a more central role than reasons of governmental efficiency.…

Such possibly political uses of the recess appointment power may not only have been superior to efficiency aims; they may actually have had an adverse impact on the federal judiciary and even have affected the internal operation of the Supreme Court.…

The perception of political pressure on recess appointees to the judiciary is as important as actual pressure. Judges may not always be consistent and may on occasion make idiosyncratic decisions, but when a recess appointee makes an idiosyncratic or unpopular decision, there may be a public perception that the opinion is the result of interbranch political pressure. Such perceptions, whether justified or not, undermine the integrity of the judiciary by calling into question the actual separation of the three governmental branches. Even the hint of such pressures upon judicial independence undermines confidence in the judiciary as the impartial decisionmaker guaranteed to all federal court litigants by article III; yet applying the recess appointment power to the federal judiciary incurs just this possibility.

Finally, in the last twenty years only one president has found it necessary to use the article II power to appoint a federal judge. Such rare use of the power, particularly despite increased federal litigation, must be balanced against the potential for both real and perceived political influence on the judiciary. The comparison demonstrates that the potential

advantages of applying article II to the federal judiciary in no measure approach the risks to the constitutional values of judicial independence and separation of powers posed by allowing temporary federal judges.

Document Source: Virginia L. Richards, note, "Temporary Appointments to the Federal Judiciary: Article II Judges?," *New York University Law Review* 60, no. 4 (October 1985): 705–06, 708–10, 722–23 (footnotes omitted).

Judge Charles R. Wilson, Dissenting Opinion in *Evans v. Stephens*, U.S. Court of Appeals for the Eleventh Circuit, October 14, 2004

In Evans v. Stephens*, the U.S. Court of Appeals for the Eleventh Circuit voted 8–2 to deny a party's motion to disqualify Judge William Pryor from participating in the case on the grounds that his recess appointment to the court was invalid. One of the two dissenting judges, Charles Wilson, expressed no opinion on the validity of Pryor's recess appointment, arguing that it would have been more prudent to ask the Supreme Court to rule on the question. Although tangential to the issue at hand, Wilson's opinion raised an interesting issue that can arise in a controversy regarding a judicial recess appointment: the dilemma facing a court when one of its own members' legitimacy is challenged.*

I dissent from the majority's decision to deny the motion of plaintiffs-appellees to disqualify Judge Pryor. Unlike the majority and Judge Barkett, I would not reach the merits of the issue, and instead would decline to exercise our discretion to entertain the motion. For the reasons that follow, I would certify the question to the Supreme Court.…

It is simply inappropriate for the members of a court to sit in judgment of a colleague's legitimacy. In the only two courts of appeals decisions addressing the recess appointment of Article III judges, circuit judges reviewed the appointment of district judges.… The mandate to review lower-court judgments is the fundamental characteristic of appellate courts. But it is nearly anathema for circuit court judges to review a colleague's legitimacy to sit as a member of their court.

My specific concern is twofold. First, we risk damaging the collegiality for which this Court is rightly known. Even our most vociferous dissents are critiques of a judge's legal reasoning in a particular case, and never (one hopes) devolve into personal rebukes. And while the recess appointment question in the motion before us is, in the strictest sense, a matter of constitutional interpretation that does not depend on the judge involved, it is inescapable that this is not a question we can answer in the abstract. A vote in favor of the legal argument presented in the motion is also a vote against Judge Pryor's membership on our Court. Moreover, even if such a decision were cast as a ruling that the President

overstepped his authority under the Recess Appointments Clause, it might also be construed as a judgment that Judge Pryor should not have accepted the appointment in the first place.

Imagine the risk to our collegiality if we granted the motion, but Judge Pryor did not accept our ruling. He might decide to file in the Supreme Court a petition for a writ of mandamus compelling us to restore him to the Court. I should stress that I have no doubt that Judge Pryor would do anything but abide by any decision of this Court, but even the slightest risk that a judge might sue his colleagues should compel us to make every effort to avoid such confrontations. Because it seems impossible to me to avoid the very personal impact of any decision we make, it is neither wise nor prudent for us to make one.

Second, we risk public confidence in the judiciary as an institution.... On the one hand, if we grant the motion to disqualify Judge Pryor in this case because he was not validly appointed to the Court, we would necessarily imply that he improperly sat in previous cases. This would instantly call into question every one of those decisions....

Conversely, if we deny the motion, the public might reasonably wonder about our motives. I have detailed above the concerns for collegiality that should be present in this case. An observer might assume that a desire to protect collegial relations, or a personal affinity for Judge Pryor developed over the course of his service to our Court, might have weighed in the decision not to remove him. As discussed, the impact of our decision will be very deeply felt by Judge Pryor. Judges are human, and we cannot risk giving the impression that our desire to avoid confrontation and maintain collegiality affected our decision. Because of the problems inherent in sitting in judgment of one's colleague, we should avoid imperiling public confidence in the Court.

Document Source: *Evans v. Stephens*, 387 F.3d 1220, 1238–40 (11th Cir. 2004).

Edward A. Hartnett, *Cardozo Law Review*, 2005

Edward Hartnett, a law professor at Seton Hall University, argued in a 2005 piece that holding office under a recess appointment did not necessarily impair the independence of a federal judge. The judge could not be removed during the term of his or her appointment other than by impeachment, and thus was protected temporarily by the "good behavior" standard of Article III. Hartnett compared such judges to other officials sometimes temporarily appointed to fill vacancies, including the President and members of Congress, who nevertheless held all of the powers of the office.

It is true, of course, that a recess appointee lacks life tenure. But a recess appointee does not serve at the pleasure of the President … but instead holds the office, subject only to impeachment, until the end of the next session of the Senate. That is, although a recess appointee only holds the office on an interim basis, during that period of time he or she is protected by the "good behavior" limitation of Article III. Similarly, recess appointees should be protected by Article III's guarantee that their compensation "not be diminished during their Continuance in Office," and their pay not be reduced so long as they hold their offices pursuant to the recess commission.

If this point seems insignificant, I suggest that it is only because of our legal culture's fixation on judges.… If we zoom out a bit, and consider other federal offices whose terms and conditions are set by the constitution, we can see its importance. Indeed, by examining those other offices, we can see that construing Article III's good behavior and undiminished compensation provisions together with Article II's recess appointment provision is not a matter of deciding which one is somehow more specific than the other, nor of choosing which of conflicting provisions reflects the more important value, but rather presents the unexceptional task of construing a provision establishing the term of an office with a provision for filling that office on an interim basis.

Consider Members of the House of Representatives. The Constitution sets their terms at two years. It also provides that "[w]hen vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." A member elected to fill a vacancy in the House, however, does not serve a two-year term.

Consider Senators. The Constitution sets their terms at six years. It also provides that:

> [w]hen vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

A Senator elected to fill a vacancy in the Senate does not serve a six-year term, much less does a Senator temporarily appointed by the governor of a state.

While Representatives and Senators selected on an interim basis do not have the tenure in office set for the regular holders of that office, they have the same power to exercise that office while they hold it, and the same protections. They are no more subject to recall or instruction than a Representative or Senator elected to a full term. Once a governor appoints an interim Senator, the governor cannot fire the Senator.

The pay of Representatives and Senators may not be increased or decreased "until an election of Representatives shall have intervened." This same rule applies to Representatives

and Senators elected on an interim basis to fill a vacancy, just as it does to Representatives and Senators elected for a full term.

Consider, finally, the President. The Constitution sets the President's term at four years. It also provides for the Vice President to become President if the President is removed from office, dies, or resigns. Yet when a Vice President becomes President, he does not serve a four-year term. He nonetheless has all of the powers and duties of the President during the period in which he holds the office, including protection from removal except by impeachment and conviction, and the guarantee that his compensation "neither be increased or diminished during the Period for which he shall have been elected." The same powers and protections apply even to a President who was never selected by the presidential electors but who, like Gerald Ford, became Vice President due to a vacancy in that office and subsequently became President upon the death or resignation of the President.

Viewed from a perspective that includes Representatives, Senators, and Presidents, along with judges, we can see that there is nothing unusual in the Constitution providing for an office, setting the tenure of that office, imposing rules governing the salary of that office, yet also creating a mechanism to fill that office on an interim basis with individuals who are not given a full term. So understood, there is no conflict between Article II's provision for recess appointments to fill "all" vacancies in the offices listed in Article II (including vacancies in Article III courts) and Article III's provision that judges hold office during good behavior—any more than there is a conflict between the provisions setting the terms of office for the President, Senators, and Representatives and the provisions for filling those offices on a temporary basis.

Moreover, understood from this broader perspective, a litigant has no more right to insist that the law be applied by a judge with the independence that life tenure brings than to insist that the law be enacted by a Senator with the independence that a six-year term brings. A Senator with a full six-year term is certainly more independent tha[n] a Senator serving on an interim basis, just a judge with life tenure is more independent than a judge serving on an interim basis. But because the constitution provides a method for filling seats in the Senate and on the bench on an interim basis, neither interim Senators nor interim judges can be dubbed unconstitutional simply because they have less independence than one serving a full term.

Although it is important to realize that a recess appointee to an Article III court does not hold his commission at the pleasure of the President, it must be admitted that there is some risk that a recess appointee might seek to curry favor with the President or Senate in order to increase his chances of a new appointment. Yet this risk is present for all judges: there are district judges who want to be circuit judges, circuit judges who want to be Supreme Court justices or solicitor general, and Supreme Court justices who want

to be Chief Justice or President. As Bruce Springsteen puts it, "Poor man wanna be rich, rich man wanna be king, And a king ain't satisfied, till he rules everything." Among the statutory safeguards against this risk are appellate review and multimember courts. Perhaps the most important constitutional safeguard is the lower house of the judiciary, the jury, particularly in criminal cases.

Document Source: Edward A. Hartnett, "Recess Appointments of Article III Judges: Three Constitutional Questions," *Cardozo Law Review* 26, no. 2 (January 2005): 436–40 (footnotes omitted).

Stephen M. Pyser, *University of Pennsylvania Journal of Constitutional Law*, 2006

Stephen Pyser, then a law clerk to a judge of the U.S. Court of Appeals for the Seventh Circuit, argued strongly against the propriety of judicial recess appointments in a 2006 law review article. Among his assertions was that Article III granted a private right to individual litigants to have their cases heard by judges with tenure during good behavior. Only with such protections, he claimed, could the guarantee of a fair and impartial judiciary be maintained.

[T]hree circuit courts have upheld the constitutionality of recess appointments to the federal bench. While these decisions dominate the discussion of this issue, each was made over strong dissents or academic criticism.…

The three circuit court opinions on this subject rely on several false analyses in concluding that recess appointments are constitutional. First, they rely on a mistaken textual analysis. Second, the majority opinions do not recognize the importance of an independent judiciary, misread the legislative history, and misinterpret legislative non-objection as implicit approval. Third, the opinions place far too great an emphasis on historical practice as evidence of de facto constitutionality, relying upon a historical record devoid of abuse as evidence of constitutionality. This reliance on historical evidence also mistakenly reads a guarantee against future abuse from the assertion that, historically, recess appointments have not been abused. Fourth, the early opinions affirming the President's right to make recess appointments to the federal bench have created a cascade effect, which has limited the constitutional analysis, and resulted in opinions that fail to question the underlying values and constitutionality of recess appointments to the federal bench.…

An individual litigant has little concern over a judge's tenure; what is important is impartiality. A litigant has a private right to ensure that the judge in his or her case will not be influenced by congressional or executive criticism. It is a breach of a judge's Article III independence "if his every vote, indeed his every question from the bench, is subject to the

possibility of inquiry in later committee hearings and floor debates to determine his fitness to continue in judicial office." A sitting judge should not be forced to work with "one eye over his shoulder on [the] Congress" that must confirm him, and the other eye fixed on a President who can pull his nomination from the floor.…

Judges sitting by recess appointment lack one of the most vital aspects of judicial authority. "There is a broad sense that a recessed appointee, even though officially and legally in the job, just doesn't carry the aura of someone given the Senate stamp of approval." As has often been noted, judges have no army or police force to enforce their decrees. They rely entirely upon the other branches and the respect given their position to ensure enforcement. If the judiciary is to be an effective force for societal order, it is imperative that its reputation be protected. Because recess appointees "would be making decisions with the prospect of a potential vote on their confirmation, decisions made by recess appointees may reflect a focus on personal political gain." The judiciary cannot afford this appearance of impropriety.…

As important as Article III's public/structural purpose is to the separation of powers, the private right granted by Article III is even more vital to individual liberty and our faith in a fair judiciary.… Lifetime tenure and guaranteed compensation create a "personal guarantee of an independent and impartial adjudication . . . ." This private right guarantees that litigants will "have claims decided before judges who are free from potential domination by other branches of government." …

Each of the three opinions upholding the constitutionality of recess appointments relies upon the strength of historical practice. Assuming, arguendo, that historical practice supports presidential recess appointments to the federal bench, the constitutional analysis is hardly complete. Historical practice, while persuasive, does not create constitutional validity. "[T]he federal judiciary must reject any unconstitutional construction by another branch of government regardless of the number of years the construction has been upheld."

A reevaluation of the constitutionality of recess appointments is necessary in light of the new purposes recess appointments are serving. Throughout the last twenty-five years, judicial appointments have become increasingly politicized. So, too, has the use of recess appointments. In comparing modern appointments to past recess appointments, one commentator noted that Chief Justice Earl Warren and Associate Justice William Brennan "received their appointments not because of a constitutional impasse due to the intransigence of a minority of senators, but because it was necessary to have a full strength judiciary and the recess appointment method permitted this." This comparison of modern and past recess appointments indicates a shift in underlying purpose. Such alteration should spur a reevaluation of constitutionality.…

The historical record is also mistakenly used, in an argument of negative implication, as demonstrative of the minimal threat to the constitutional order posed by recess appointments. *Allocco* and *Woodley* both cite a historical record allegedly devoid of executive branch abuse. The fear that a recess appointee would be "a lion under the throne" of the executive branch should not be dismissed on the slim foundation that such evils have not occurred in the past. By this reasoning, a future court might find that a recess appointee who was, in its opinion, unduly influenced by the President lacks jurisdiction while a similarly situated judge who was not unduly influenced has jurisdiction and may exercise Article III powers. As a jurisdictional question, establishing the Article III credentials of a judge is an initial hurdle, to be asked prior to any further evaluation of underlying judicial motives.

The constitutional protections of lifetime tenure and guaranteed compensation do not exist as a background cause for dismissal if a judge is unfairly influenced or coerced. They stand, rather, as a guarantee to all litigants that the judge hearing their case will be independent from executive and legislative branch influence. By relying upon arguments such as that of Attorney General Wirt, that recess appointments "cannot possibly produce mischief, without imputing to the President a degree of turpitude entirely inconsistent with the character which his office implies," the *Allocco* court misses the jurisdictional nature of the question. The question is not the "turpitude" exhibited in a particular case, but the jurisdiction of a judge without lifetime tenure to hear a matter designated to an Article III court.…

In comparing underlying values, a litigant's right to a fair and impartial trial should trump the justifications given for the recess appointment power. Efficiency and the ability of the President to expediently choose judges does not rise to the level of a fundamental right, as does the private right to a fair and impartial trier of fact.

Document Source: Stephen M. Pyser, "Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent," *University of Pennsylvania Journal of Constitutional Law* 8, no. 1 (January 2006): 88–89, 92–93, 97–99, 101 (footnotes omitted).

Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?