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751 F.2d. 1008 (1985)

UNITED STATES of America,
Plaintiff-Appellee,

v.

Janet WOODLEY, Defendant-Appellant.

No. 82-1028.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted En Banc
Aug. 16, 1984.

Decided Jan. 14, 1985.

Defendant was convicted in the United States District Court for the District of Hawaii, Walter M. Heen, J., and Martin Pence, Senior District Judge, of narcotics offenses and she appealed. The Court of Appeals, Norris, Circuit Judge, 726 F.2d 1328, vacated and remanded. On rehearing en banc, the Court of Appeals, Beezer, Circuit Judge, held that the president may constitutionally confer temporary federal judicial commissions during a recess of Senate; thus, district judge whose commission was conferred during recess could constitutionally preside over criminal trial.

Remanded.

Norris, Circuit Judge, filed a dissenting opinion in which Fletcher, Ferguson and Reinhardt, Circuit Judges, joined.

1. Judges ⇐39

Standing alone, withdrawal of nomination of district judge, whose commission has been conferred pursuant to recess appointment clause of the Constitution, did not impair his authority to sit as a district court judge. U.S.C.A. Const. Art. 2, § 2, cl. 3.

2. Judges ⇐3

The president may constitutionally confer temporary federal judicial commissions during a recess of Senate pursuant to recess appointment clause; thus, district judge whose commission was conferred during during Senate recess could constitutionally preside over criminal trial. U.S.C.A. Const. Art. 2, § 2, cl. 3.

3. Judges ⇐3

More specific language of Article III does not govern the language of recess appointment clause thereby forbidding interim judicial recess appointments since recess appointment clause is equally specific in addressing manner of appointment of federal judges. U.S.C.A. Const. Art. 2, § 2, cl. 3; Art. 3, § 1 et seq.

4. Judges ⇐8

Language of recess appointments clause giving president power to fill all vacancies that may happen during recess of Senate does not mean that only those vacancies that occur during the recess itself can be filled by presidential appointment. U.S.C.A. Const. Art. 2, § 2, cl. 3.

5. Judges ⇐3

Recess appointment clause allowing for recess appointment of judges is not a mere "housekeeping measure" which prevents those judges from having attributes of Article III judges. U.S.C.A. Const. Art. 2, § 2, cl. 3; Art. 3, § 1 et seq.

6. Judges ⇐7

Recess appointments clause allowing for recess appointment of judges may be invoked only when the Senate is in recess and recess commissions expire at the end of the next congressional term. U.S.C.A. Const. Art. 2, § 2, cl. 3.

Pamela Berman, Honolulu, Hawaii, for plaintiff-appellee.

Robert Erickson, Dept. of Justice, Washington, D.C., for defendant-appellant.

Appeal from the United States District Court for the District of Hawaii.

Before BROWNING, Chief Judge, SNEED, SKOPIL, FLETCHER, FARRIS, ALARCON, POOLE, FERGUSON, NORRIS, REINHARDT, and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:

We take this case en banc to address the constitutionality of a practice followed by the Executive for nearly 200 years. The question before us is whether the President of the United States may constitutionally confer temporary federal judicial commissions during a recess of the Senate pursuant to article II, section 2 of the Constitution.

I

[1] On February 28, 1980, Walter Heen was nominated to fill a judicial vacancy in the United States District Court for Hawaii. The Senate Judiciary Committee began confirmation hearings on his nomination on September 25, 1980. When the Senate recessed on December 16, 1980, testimony and hearings on the nomination were complete, but the nomination did not come before the full Senate for its advice and consent. During the Senate's recess, on December 31, 1980, President Carter conferred a commission on Judge Heen pursuant to the recess appointment clause of article II of the United States Constitution. Heen then took his oath and assumed his duties as district court judge. On January 21, 1981, Heen's nomination was withdrawn by President Reagan. Heen continued sitting as a district judge pursuant to his recess commission until December 16, 1981, when the 97th Congress ended its First Session.[1]

On September 18, 1981, while Heen was sitting out his commission, appellant Janet Woodley was indicted on three counts of narcotics violations. Woodley filed a motion to suppress evidence, which was denied by Heen. Judge Heen then presided over a bench trial on stipulated facts and found Woodley guilty as charged in the indictment.

[2] Woodley appealed the denial of her motion to suppress. A panel of this court raised the issue *sua sponte* whether Judge Heen could constitutionally preside over Woodley's trial.[2] The panel held that he could not and it vacated Woodley's conviction. *United States v. Woodley*, 726 F.2d 1328, 1339 (9th Cir.1983). The court having convened en banc, *United States v. Woodley*, 732 F.2d 111 (9th Cir.1984) (order granting rehearing en banc), we hold that the recess appointment clause extends to judicial officers and that a recess appointee to the federal bench can exercise the judicial power of the United States.

II

[3] The recess appointment clause provides that: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. Article III, in turn, provides in relevant part that: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1.

Woodley contends that under generally accepted principles of statutory construction, the more specific language of article III governs over the general language of the recess appointment clause. She concludes therefore that article III forbids interim judicial recess appointments. We reject this argument.

The United States Supreme Court has unequivocally stated that "[t]he Constitu-

1. Withdrawal of Judge Heen's nomination, standing alone, did not impair his authority to sit as a district court judge. *See* U.S. Const. art. II, § 2, cl. 3; *see also In re Marshalship for the Southern and Middle Districts of Alabama*, 20 Fed. 379, 382 (N.D.Ala.1884) (recess commission continues until end of next session of Congress).

2. Although the recess appointment issue was not raised by the parties, this court must examine jurisdictional problems *sua sponte*. *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 n. 2 (9th Cir.1983). The case at bar presents such a jurisdictional issue and is subject to our review. *See, e.g., Glidden Co. v. Zdanok*, 370 U.S. 530, 536, 82 S.Ct. 1459, 1465, 8 L.Ed.2d 671 (1962).

tion ... must be regarded as one instrument, all of whose provisions are to be deemed of equal validity." *Prout v. Starr*, 188 U.S. 537, 543, 23 S.Ct. 398, 400, 47 L.Ed. 584 (1903). Moreover, while article III speaks specifically about the tenure of federal judges, article II is equally specific in addressing the manner of their appointment. There is therefore no reason to favor one Article over the other.

The language of the recess appointment clause explicitly provides that the President has the power to fill *all* vacancies during the recess of the Senate. The *Federalist* papers clarify the meaning of the recess clause, stating that it "is to be considered as supplementary to the [clause] which precedes" and that the vacancies referred to "must be construed to relate to the 'officers' described in the preceding [clause]." *The Federalist No. 67*, at 455 (A. Hamilton) (J. Cooke ed. 1961). The preceding clause in question provides in relevant part that the President "shall nominate, and by and with the Advice and Consent of the Senate shall appoint ... *Judges of the supreme Court, and all other Officers of the United States....*" U.S. Const. art. II, § 2, cl. 2 (emphasis added). This language further underscores that there is no basis upon which to carve out an exception from the recess power for federal judges. Particularly relevant in this context is Alexander Hamilton's statement that "[a]s to the mode of appointing the judges: This is the same with that of appointing the officers of the union in general...." *The Federalist No. 78, supra*, at 522.[3]

III

Woodley also argues that there is no historical evidence that the Framers intended the recess provision to apply to the judiciary. This argument is not only refuted by the express language of the recess clause, which, as previously noted, refers to *all* vacancies, but it is also refuted by legislative history, as well as historical practice, consensus, and acquiescence.

Although the recess appointment clause was adopted without debate, 2 Farrand, *Records of the Federal Convention* 533, 540 (1911), there is evidence that it was not entirely uncontroversial. Edmund Randolph, the governor of Virginia, initially declined to sign the Constitution, in part because the recess provision gave the Executive the power to confer judicial commissions during the recess of the Senate. 3 Farrand, *supra*, at 123, 127.

In 1789, shortly after ratification of the Constitution, George Washington, who had served as President of the Constitutional Convention, exercised his power under the recess provision. During the recess between the sessions of the First Congress, he conferred three recess district judge commissions. 30 *The Writings of George Washington*, 457–58, 473, 485 n. 75 (J. Fitzpatrick ed. 1939). At the time of these appointments, Edmund Randolph and two contributors to *The Federalist*, Alexander Hamilton and John Jay, served as members of President Washington's Cabinet. There is no evidence that they doubted the constitutionality of the recess appointments.[4] Moreover, the district court judges were confirmed upon the return of the Senate without objection to their recess appointments. 1 *Executive Journal of the Senate* 38, 40 (1790). It is further noteworthy that President Washington's recess appointments of Justice Johnson in 1791 and of Chief Justice Rutledge in 1795 went unchallenged.[5] One commentator has aptly

3. The United States Supreme Court has noted that "[t]he opinion of [*The Federalist*] has always being considered as of great authority ... and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 120, 187, 5 L.Ed. 257 (1821).

4. Randolph, who was Attorney General, was advised by President Washington of Judge Griffin's recess appointment. *See* 30 *Writings of George Washington, supra*, at 472–73. Secretary of State Jay, in turn, had the duty to seal all civil commissions. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 87, 98, 2 L.Ed. 60 (1803).

5. Although Rutledge was not ultimately confirmed, it was not because he was a recess

noted that "the most significant historical fact is that by the end of 1823, there had been five recess appointments to the Supreme Court. During this period, when those who wrote the Constitution were alive and active, not one dissenting voice was raised against the practice." Note, *Recess Appointments to the Supreme Court—Constitutional But Unwise?*, 10 Stan.L.Rev. 124, 132 (1957).

The actions of the three branches of our government have consistently confirmed the President's power to make recess appointments. The Executive Branch has made extensive use of the recess power. Approximately 300 judicial recess appointments have been made in our nation's history.[6] Presidents Eisenhower and Kennedy alone made fifty-three such appointments during their Administrations. *See* H. Chase, *Federal Judges The Appointing Process* 86–88, 114–15 (1972).

The Legislative Branch has consistently confirmed judicial recess appointees without dissent. Moreover, Congress has passed legislation providing for the salaries of recess appointees, without excluding judges. 5 U.S.C. § 5503; *see also* S.Res. 334, 86th Cong., 2d Sess., 106 Cong.Rec. 18,130–45 (1960) (statement of Senator Hart) (confirming President's power to make judicial recess appointments).

Finally, we turn to the Judicial Branch. The only direct challenge, prior to the present action, to the President's power to make judicial recess appointments was rejected by the Second Circuit in *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964, 83 S.Ct. 545, 9 L.Ed.2d 511 (1963). Although the United States Supreme Court has never passed on the issue, numerous Justices have been recess appointees. Chief Justice Rutledge sat as a recess appointee for six months and participated in two decisions. He delivered the opinion of the Court in *United States v. Peters*, 3 U.S. (3 Dall.) 96, 1 L.Ed. 535 (1795) and wrote with the majority in *Talbot v. Jansen*, 3 U.S. (3 Dall.) 105, 1 L.Ed. 540 (1795). Justice Curtis, who received a recess appointment in 1851, sat as a judge of the Circuit Court of the United States for the First Circuit and the Rhode Island District Court, while he was a recess appointee. *See* Note, *supra*, at 131 n. 24. Altogether, fifteen recess appointments have been made to the Supreme Court. Staff of House Comm. on the Judiciary, 86th Cong., 1st Sess., *Recess Appointments of Federal Judges* 40 (Comm. Print 1959). Of these, at least four appointees sat on the Court prior to their confirmation. Note, *supra*, at 125. There is no evidence that any member of the Supreme Court ever objected to this practice on constitutional grounds.

IV

Our historical review demonstrates that there is an unbroken acceptance of the President's use of the recess power to appoint federal judges by the three branches of government. Woodley argues, however, that the Supreme Court's recent decision in *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), teaches that historical patterns cannot save an unconstitutional practice.

We agree that historical acceptance alone cannot conclusively establish a practice's constitutionality. Yet while we rely only in part on historical consensus in upholding the President's authority to make judicial recess appointments, we cannot ignore historical observance. The teachings of *Chadha* are not to the contrary. That case held that historical acceptance of the legislative veto could not prevent it from running afoul of the Constitution. 103 S.Ct. at 2279 n. 13. The legislative veto is, however, a recent practice, barely 50 years old. Its use does not reach back to the days of the Framers, such as the practice at issue. Moreover, it is an impermissible statutory

appointee, but because of his opposition to the Jay Treaty. *See Ex parte Ward*, 173 U.S. 452, 454 n. 1, 19 S.Ct. 459, 43 L.Ed. 765 (1899).

6. These statistics were compiled from the files of the Office of the Deputy Attorney General at our request.

methodology, unsupported by an express constitutional grant of authority. While the use of the recess clause to make temporary judicial appointments has been accepted by all three branches of government for nearly 200 years, the relatively young legislative veto has been referred to by the United States Supreme Court as "the most recent episode in a long tug of war between the Executive and Legislative Branches...." *Buckley v. Valeo*, 424 U.S. 1, 140 n. 176, 96 S.Ct. 612, 692 n. 176, 46 L.Ed.2d 659 (1976) (per curiam).[7]

The United States Supreme Court has made clear that considerable weight is to be given to an unbroken practice, which has prevailed since the inception of our nation and was acquiesced in by the Framers of the Constitution when they were participating in public affairs. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322, 57 S.Ct. 216, 221, 81 L.Ed. 255 (1936); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 412, 48 S.Ct. 348, 353, 72 L.Ed. 624 (1928); *Stuart v. Laird*, 5 U.S. (1 Cranch) 185, 191, 2 L.Ed. 115 (1803). This principle was reaffirmed by the Court less than a month after *Chadha*. In *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), Chief Justice Burger, who also authored *Chadha*, noted that "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Marsh*, 103 S.Ct. at 3336. Much in the same way, the use of the recess provision to appoint federal judges has been inextricably woven into the fabric of our nation.

V

[4] Woodley says that a technical argument could be made that the language of the recess clause giving the President the power to fill all vacancies that "may happen during the Recess of the Senate," means that only those vacancies that occur during the recess itself can be filled by Presidential appointment. She reasons therefore that Judge Heen's appointment is invalid, because the vacancy which he filled did not occur during a recess of the Senate. Woodley's interpretation conflicts with a common sense reading of the word *happen*, as well as the construction given to this word by the three branches of our government.

In a vacuum, the use of the word *happen* could be interpreted to refer to vacancies that either "happen to occur" or "happen to exist" during a recess of the Senate.[8] Yet the former interpretation would lead to the absurd result that all offices vacant on the day the Senate recesses would have to remain vacant at least until the Senate reconvenes. Not only judicial positions, but all offices within the purview of article II, § 2, clause 2 would have to remain vacant. The positions of cabinet members and other high government officials would have to remain unfilled until the return of the Senate. If a vacancy occurred on the last day before the Senate's recess, the President would be without power to fill that vacancy in the ensuing recess. Even assuming that the Senate was informed of the vacancy prior to its recess and the

7. The first legislative veto provision was challenged shortly after its passage. *See* 37 Op. Att'y Gen. 56, 63–64 (1933). Eleven Presidents have gone on record challenging the Congressional veto power as unconstitutional. *Chadha*, 103 S.Ct. at 2779 n. 13.

8. English language dictionaries of the Seventeenth, Eighteenth and Nineteenth centuries shed little light on this issue. *See, e.g., Cole's Dictionary* (1692) (defining "hap" as "to catch or snatch"); *Blount's Dictionary* (2d ed. 1719) (defining "happe" as to "match or catch"); *Bailey's Dictionary* (1737) ("to fall out"); *Sheridan's English Dictionary* (2d ed. 1789) ("To fall out by chance, to come to pass; to light on by accident"); 1 *Webster's Dictionary* (1828) ("To come by chance," "to come, to befall," "to light"); *Richardson's English Dictionary* (1839) ("Any thing, something, that comes or falls into our hold or possession, any thing caught; chance accident, luck.") It is noteworthy, however, that it is only in modern usage that *happen* has come to signify merely "to take place or occur." *Webster's New International Dictionary* (2d ed. 1934).

President submitted a timely nomination, the Senate would still be faced with the dilemma of either confirming a candidate of whose qualifications little is known or leaving that office vacant until the Senate reconvenes. We agree with the Second Circuit that this interpretation "would create Executive paralysis and do violence to the orderly functioning of our complex government." *Allocco*, 305 F.2d at 712; *see also* Note, *supra*, at 126 (apparent purpose of recess clause "was to assure the President the capacity for filling vacancies at any time to keep the Government running smoothly"). We cannot attribute to the Framers an intent to create such a potentially dangerous situation. *See South Carolina v. United States*, 199 U.S. 437, 449, 26 S.Ct. 110, 111, 50 L.Ed. 261 (1905).

We also emphasize that both the courts and the Executive Branch have consistently construed the recess clause as giving the President the authority to fill all vacancies that exist while the Senate is in recess. *See, e.g., Allocco*, 305 F.2d at 712–15 (President may make appointments to all vacancies that exist during a Senate recess); *In re Farrow*, 3 Fed. 112, 116 (N.D.Ga.1880) (President has power to make appointments "notwithstanding the fact that the vacancy filled by his appointment first happened when the senate was in session."); 1 Op.Att'y Gen. 631, 633 (1823) ("[W]hether [a vacancy] arose during the session of the Senate, or during their recess, it equally requires to be filled."); 2 Op.Att'y Gen. 525, 528 (1832) (President may make recess appointments " 'if there happen to be any vacancies during the recess.' "); 19 Op. Att'y Gen. 261, 263 (1889) ("[W]*herever there is a vacancy there is a power to fill it.*") (emphasis in original).

Both Houses of Congress have apparently recognized the soundness of this construction of the recess power. *See* Nomination of Charles Beecher Warren to be Attorney General, 67 Cong.Rec. 263–64 (1925) (recognizing President's power to fill vacancies regardless of when they arose); 52 Cong.Rec. 1369–70 (1915) (statement of Congressman Borland) (recognizing power of president to fill vacancies that occurred during a previous session of the Senate). Moreover, Congress has provided for payment of recess appointees, such as Heen, whose nominations were pending at the time of the Senate's recess. 5 U.S.C. § 5503(a)(2). We therefore decline to adopt Woodley's "happen to occur" argument and recognize the President's power to fill all vacancies that exist during a recess of the Senate.

VI

[5] Finally, we address Woodley's related arguments that the recess appointment clause is merely a "housekeeping measure" and that Judge Heen lacks the attributes of an article III judge contrary to the teachings of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

In *Marathon*, Justice Brennan's plurality opinion held that Congress may not, through a statute, constitutionally vest the non-article III adjunct bankruptcy judges with article III powers. *Id.* at 87, 102 S.Ct. at 2880.[9] Yet the present case is not concerned with an attempt to circumvent article III by statute, but with the scope of an express constitutional provision. Moreover, the recess appointment clause is not simply a statutory solution to a judicial problem or a mere housekeeping measure. The clause prevents the Executive from being incapacitated during the recess of the Senate. This in turn prevents extended judicial vacancies, which can cause the denial of the important right of access to the courts. The Framers considered the recess appointment clause sufficiently important to include it in the Constitution. In the early days of the Republic, travel time was measured in days, not hours, and extended congressional recesses were expected. The advent of modern jet travel, instant communication, and present day prolonged sessions of Congress do not justify character-

9. Justice Brennan was himself a recess appointee.

izing the recess appointment clause merely as a housekeeping measure.

[6] A recess appointee lacks life tenure and is not protected from salary diminution. As a result, such an appointee is in theory subject to greater political pressure than a judge whose nomination has been confirmed. Yet our Constitution has bestowed upon the Executive the power to make interim judicial appointments. This power is not unfettered, however, but is subject to its own limitations and safeguards. It may only be invoked when the Senate is in recess, and recess commissions expire at the end of the next congressional session. U.S. Const. art. II, § 2, cl. 3; *see Staebler v. Carter*, 464 F.Supp. 585, 597 (D.D.C.1979). We must therefore view the recess appointee not as a danger to the independence of the judiciary, but as the extraordinary exception to the prescriptions of article III. *Cf. Marathon*, 458 U.S. at 70, 102 S.Ct. at 2871 (certain exceptional powers bestowed upon Congress by Constitution not subject to prescriptions of article III). The judicial recess appointee, who has sworn to uphold the Constitution, fills a void left by those preceding in office, thereby permitting the unbroken orderly functioning of our judicial system.

It should also be noted that as a practical matter, a recess appointee could not be a "lion under the throne," subject to the whims of the President. 28 U.S.C. § 144 (bias or prejudice of a judge). "The evils of legislative and executive coercion ... have no support in our nation's history." *Alloco*, 305 F.2d at 709.

VII

Even 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. Accordingly, we hold that Judge Heen, as a recess appointee to the federal bench, could exercise the judicial power of the United States.

The case is remanded to the panel for determination on the merits.

BROWNING, Chief Judge, SNEED, SKOPIL, FARRIS, ALARCON and POOLE, Circuit Judges, concurring.

NORRIS, Circuit Judge, with whom FLETCHER, FERGUSON and REINHARDT, Circuit Judges, join dissenting.

Article III of the Constitution provides that "[t]he judicial Power of the United States" shall be exercised by judges whose independence from the political branches of government is assured by guarantees of life tenure and undiminished compensation. Today, our Court carves out an exception to this explicit and unqualified constitutional command by holding that the judicial power of the United States may be exercised by judges who serve at the pleasure of the President and the Senate. As Professor Freund aptly commented, every recess appointee sits with "one eye over his shoulder on Congress." *Harvard Law School Record*, October 8, 1953, p. 1, col. 5. He has no assured tenure beyond the next session of the Senate.

I agree with the majority that there is a direct conflict between the Recess Appointments Clause of Article II and the tenure and salary provisions of Article III of the Constitution. I also agree with the majority that in deciding which clause should prevail, we must look beyond the Constitution itself. As the majority observes, the text gives us "no reason to favor one article over the other."

Nor do the contemporaneous writings of the Framers of the Constitution shed much light on the issue. *The Federalist* and other sources overflow with references to the importance of an independent judiciary as a corollary of the very centerpiece of the constitutional plan—the separation of powers. But the records of the constitutional era tell us virtually nothing about the Recess Appointments Clause or how it was to interact with the tenure and salary provisions of Article III.

My major point of disagreement with the majority is its reliance upon the executive's practice of making recess judicial appointments as virtually the sole basis for its conclusion that the practice is constitutional. In my view, the majority skips what I believe should be a crucial step in the constitutional inquiry: evaluating and balancing the competing constitutional values at stake. Because of its uncritical acceptance of the historical practice as determinative of the constitutional issue, the majority fails to make any serious comparative analysis of the concerns for governmental efficiency underlying the Recess Appointments Clause and the principle of judicial independence underlying the tenure and salary provisions of Article III.

We need only look to recent history to appreciate that there is genuine tension between the values underlying the two opposing constitutional provisions. President Eisenhower's recess appointments to the Supreme Court of Chief Justice Earl Warren in 1953 and Justice Brennan in 1956 both created controversy about the legitimacy of recess appointments to that Court. Senator Joseph McCarthy's public interrogation of Justice Brennan while the latter was a sitting Justice of the Court tells its own cautionary tale:

> Senator McCarthy. You, of course, I assume, will agree with me and a number of the members of the committee—that communism is not merely a political way of life, it is a conspiracy designed to overthrow the United States Government.
>
> Mr. Brennan. Will you forgive me an embarrassment, Senator. You appreciate that I am a sitting Justice of the Court. There are presently pending before the Court some cases in which I believe will have to be decided the question what is communism, at least in the frame of reference in which those particular cases have come before the Court.
>
> I know, too, that you appreciate that having taken an oath of office it is my obligation not to discuss any of those pending matters. With that qualification, whether the label communism or any other label, any conspiracy to overthrow the Government of the United States is a conspiracy that I not only would do anything appropriate to aid suppressing, but a conspiracy which, of course, like every American, I abhor.
>
> Senator McCarthy. Mr. Brennan, I don't want to press you unnecessarily, but the question was simple. You have not been confirmed yet as a member of the Supreme Court. There will come before that Court a number of questions involving the all-important issue of whether or not communism is merely a political party or whether it represents a conspiracy to overthrow this Government.
>
> I believe that the Senators are entitled to know how you feel about that and you won't be prejudicing then any cases by answering the question.

Hearings Before the Senate Committee on the Judiciary on Nomination of William Joseph Brennan, Jr.: 85th Cong., 1st Sess., 17–18 (1957).

Even before Justice Brennan's ordeal, the recess appointment of Chief Justice Warren provoked what seems to have been the first scholarly comment concerning the constitutionality of such appointments.[1] The Warren appointment occurred after *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), was originally argued to the Supreme Court but before reargument actually took place. In response to the Warren appointment, the eminent constitutional scholar Professor Henry M. Hart, Jr. warned that for Warren to take his seat and decide cases before his confirmation by the Senate would "violate the spirit of the Constitution, and possibly also its letter." *Harvard Law School Record*, October 8, 1953, p. 2, col. 2. Professor Hart noted that Warren's permanent appointment would be

1. It was not until *United States v. Allocco*, 305 F.2d 704 (2d Cir.1962), that the question was apparently first presented to an Article III court for decision. *See* Part V *infra*.

> subject to three future contingencies: (1) the decision of the President to forward his nomination to the Senate; (2) the decision of the President not to withdraw the nomination before it has been acted upon; and (3) the decision of the Senate to confirm the nomination. The Senate will be entirely free ... to postpone its action until near the close of the session in order to see how the new nominee is going to vote.

Id. Hart then stated, "I cannot believe that the Constitution contemplates that any Federal judge ... should hold office, and decide cases, with all these strings tied to him." *Id.* Recognizing that, as the majority here stresses, recess appointments had been made in the past and that Attorneys General had assumed such appointments to be valid, Hart stressed that "occasional practice backed by mere assumption cannot settle a basic question of constitutional principle." *Id.* Looking to "the spirit and purpose of the Constitution," Hart observed,

> the impropriety [of recess appointments to the federal judiciary] becomes unmistakable. On few other points in the Constitutional Convention were the framers in such complete accord as on the necessity of protecting judges from every kind of extraneous influence upon their decisions.

Id. Hart concluded, a judge

> cannot possibly have this independence if his every vote, indeed his every question from the bench, is subject to the possibility of inquiry in later committee hearings and floor debates to determine his fitness to continue in judicial office.

Id. The majority today all but ignores the careful analysis of constitutional purposes and values that Professor Hart obviously believed was critical to resolution of the tension between Article III and the Recess Appointments Clause.

To be sure, the executive's practice of vesting recess appointees with Article III power has a long and impressive historical pedigree, but the majority indiscriminately defers to this practice as dispositive of its constitutionality. In my view, such uncritical acceptance of a practice as a basis for judging its constitutionality is inconsistent with the judiciary's historic role as the final arbiter of the constitutionality of the actions of the political branches of government. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). To make my point that the majority allows practice to play an exaggerated role in its constitutional analysis, I will employ a four-step inquiry. First, I will review the text of the Constitution. Second, I will examine the contemporaneous writings of the Framers as they pertain to the two clauses in question. Third, I will weigh the competing values that animate the two clauses. Finally, after discussing the role of historical practice as a factor in constitutional analysis generally, I will consider the specific practice of making recess judicial appointments as a factor in deciding the constitutionality of that practice.

I. THE CONSTITUTIONAL TEXT

The Constitution presents us with two separate and contradictory clauses, one in Article II and one in Article III, each clear and unambiguous on its face. The Recess Appointments Clause, Article II, section 2, provides:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

U.S. Const., art. II, § 2, cl. 3.

When read in light of a preceding clause, U.S. Const. art. II, § 2, cl. 2, which gives the President the general power to "appoint Ambassadors ..., Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for ...," the language of Article II seems to empower the President to grant recess commissions to fill judicial vacancies.

Article III, on the other hand, seems equally clear that only persons with the independence secured by life tenure and protection against diminished compensation

may exercise the judicial power of the United States. The relevant portion of Article III states simply and unconditionally,

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art. III, § 1. On its face, this language admits of no exception; its command is that only judges with Article III protections may wield Article III power.

Hence, we face an extraordinary situation: a direct conflict between two provisions of the Constitution. No accommodation seems possible; one clause must yield to the other. The majority, in holding that Judge Heen could serve as an Article III judge without possessing Article III protections, resolves the conflict in favor of the Recess Appointments Clause. In doing so, it necessarily reads into the unambiguous language of Article III an exception for recess appointees. I recognize, of course, that the converse is also true: to hold that the Recess Appointments Clause does not apply to Article III judges would in turn mean reading an exception into that clause. That, in the last analysis, is the choice I believe we should make.

Because I agree with the majority that the tension between these two contradictory provisions cannot be resolved solely by reference to the Constitution itself,[2] I turn next—as we customarily do when the meaning of the Constitution is not clear from its text—to the contemporaneous writings that reflect the thinking of the Framers. Unfortunately, those sources also fail to tell us which of the two competing clauses the Framers intended to prevail over the other.

II. THE CONTEMPORANEOUS WRITINGS

The contemporaneous writings of the Framers are virtually barren of any references to the Recess Appointments Clause. Although the record contains a few scattered references to the Clause, it was never explained, debated or discussed in any meaningful way. *See* Note, *Historical Practice* at 1766–73; Note, *Recess Appointments* at 126–130. Other than the text of Article II, Section 2 itself, all we know is that the Clause was proposed just ten days before the end of the Constitutional Convention and was adopted without debate. 2 Farrand, *The Records of the Federal Convention of 1787* 540 (1911); C. Rossiter, *1787: The Grand Convention* 224 (1966).

Even *The Federalist*, normally a fruitful source of information on the thinking of the Framers, is almost silent on the subject of the President's power to make recess appointments. *The Federalist*, No. 76, quotes the Clause itself but fails to mention the judicial branch of government.[3] Although *The Federalist*, No. 78, does state that the "mode of appointing the judges ... is the same" as that "fully discussed in the two last numbers," *id.* at 503, "the two last numbers" of *The Federalist*, Nos. 76 and 77, which were concerned with the appointment of other federal officers, include no reference to the Re-

2. The two law review treatments of the question, both student notes, also agree that the issue cannot be resolved by reference to the constitutional text alone. *See* Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 Colum.L.Rev. 1758, 1766 (1984) [hereinafter cited as Note, *Historical Practice*]; Note, *Recess Appointments to the Supreme Court—Constitutional But Unwise?*, 10 Stan.L.Rev. 124, 130 (1957) [hereinafter cited as Note, *Recess Appointments*].

3. *The Federalist*, No. 67, (A. Hamilton) (Modern Library ed. 1937) [Hereinafter, all references to *The Federalist* are to the Modern Library edition.], refutes the specious argument by anti-federalists that the President would be empowered by the Recess Appointments Clause to make interim appointments to the Senate.

cess Appointments Clause other than its verbatim quotation at the outset of No. 76.

In contrast to the paucity of comments on the Recess Appointments Clause by the Framers, the historical record is a cornucopia of references to the principle of life tenure enshrined in Article III. History makes absolutely clear the supreme importance the Framers attached to an independent judiciary as a vital corollary to the fundamental concept of the constitutional plan, the separation of powers.

The experience of the Framers with the colonial judiciary had not been a happy one. The signers of the Declaration of Independence charged that the King "obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers. He has made Judges dependent on his Will alone for the tenure of their office and the amount and payment of their salaries." The Declaration of Independence para. 11–12 (U.S.1776). The Framers recognized that these protections, when embodied in the Act of Settlement of 1701, had previously freed English judges from royal control. To translate their concern for judicial independence into practice, the Framers included in Article III the requirement that federal judges have permanent tenure and undiminishable compensation. *See* Pittman, *The Emancipated Judiciary in America: Its Colonial and Constitutional History*, 37 A.B.A.J. 485, 588 (1951). The Framers were determined to ensure that federal judges would not be beholden to the executive or the legislature but only to the law and their own consciences.

In contrast with the dearth of references to the Recess Appointments Clause, the contemporaneous writings overflow with commentary on the fundamental importance of permanency in office as the cornerstone of an independent judiciary. Alexander Hamilton, writing as Publius, eloquently expressed the concerns of the Framers:

> [A]s liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches; and that as *nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.*

The Federalist, No. 78 at 504–05 (emphasis added).

Hamilton also articulated the Framers' belief that life tenure was necessary to ensure that the judiciary would play its crucial role as the guardian of individual liberty against the power of government:

> If then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in judges which must be essential to the faithful performance of so arduous a duty.

The Federalist, No. 78 at 508. Thus, the letter as well as the spirit and guiding intention of Article III is inconsistent with the exercise of judicial power by recess appointees whose tenure is dependent upon both political branches of government.[4]

In sum, the Framers left us an abundance of commentary on Article III, but only a few scattered general references to the Recess Appointments Clause. The only explicit reference to the interaction of the

4. The Columbia Note expressed the conclusion as follows: "In short, the evidence is overwhelming that the framers accorded a central role to article III's tenure and salary provisions in ensuring judicial independence and thereby contributing to the constitutional scheme of separation of powers." Note, *Historical Practice*, at 1767–68.

two provisions is in Edmund Randolph's letter to the Virginia House of Delegates explaining his reasons for not signing the proposed Constitution transmitted to the states by the Constitutional Convention. 3 Farrand, *supra*, 123–27.

In his letter, Randolph argues that the Constitution had created an excessively powerful executive, citing as partial evidence for this view his belief that the Recess Appointments Clause gave the President the power of conferring judicial commissions during the recess of the Senate. There is no evidence, however, that Randolph's comments about the Recess Appointments Clause in this letter represented anything other than the temporary position of a volatile political figure whose "gyrations" regarding both the value and meaning of the Constitution are well known to historians. *See*, J. Main, *The Anti-Federalists: Critics of the Constitution, 1781–1788* 257 (1961). By the time of Virginia's state convention on the Constitution, Randolph had so far banished his earlier doubts regarding the Constitution that he had actually become one of its "staunchest supporters." G. Bancroft, *History of the Formation of the Constitution of the United States* 316 (1882).

Contrary to the impression created by his letter, Randolph stated at the Virginia convention that the powers of the President were in all respects carefully circumscribed: "He can do no important act without the concurrence of the Senate." 3 J. Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 201 (1907) (5 vols.) [hereinafter cited as *Elliott's Debates*]. He attacked the provisions for the appellate jurisdiction of the federal judiciary, but he maintained that judicial independence had been adequately guaranteed. 3 *Elliott's Debates* 205. Despite the fact that Randolph consistently highlighted the flaws in the Constitution for the benefit of his fellow members of the Virginia state convention, he never repeated his original concern about the Recess Appointments Clause, even on the day the Clause was read aloud to the Virginia convention.[5] In fact, the Virginia convention did not discuss the Clause at all. 3 *Elliott's Debates*. As at the other state conventions, the only doubts raised at the Virginia convention about the independence of the judiciary stemmed from the fact that the Constitution did not prohibit augmentation of judicial salaries, not from the Recess Appointments Clause. 3 *Elliott's Debates* 517.

Other than Randolph's letter, there is no evidence in any of the extant records of the Constitutional Convention or of the various state conventions that the Framers intended the Recess Appointments Clause to apply to the judiciary. *See* Farrand, *The Records of the Federal Convention of 1787* (1911); J. Strayer, *The Delegate from New York* (1939) (Constitutional Convention Notes of John Lansing, Jr.); Hutson, "John Dickinson at the Federal Constitutional Convention," 40 *William and Mary Quarterly* 256 (1983); Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1907). For all the record shows, the Framers' attention was never focused on the conflict. If it did occur to them, it was not mentioned in the debates. As one commentator concludes, "The legislative history of article III and of the recess appointments clause reveals no specific intent on the part of the framers regarding how the two provisions would interact." Note, *Historical Practice* at 1768.

Thus, the contemporaneous writings contain scant mention of the Recess Appointments Clause. They do contain extensive commentary on Article III, but with the isolated exception of Randolph's letter, the contemporaneous writings do not address the relationship between the two clauses. As one scholarly commentary concluded:

5. The Columbia Note acknowledges the limited force of Randolph's remarks: "These postconvention changes in position undercut any attempt to attribute Randolph's initial understanding of the recess appointments clause to the framers as a group." Note, *Historical Practice* at 1772 n. 79.

> Although the legislative history of the recess appointments clause arguably supports extending the clause to vacancies in the federal judiciary, this evidence must be balanced against the heavy emphasis that article III's legislative history places on the value of judicial independence. Taken together, therefore, the legislative history of the two provisions is equally capable of supporting either of two interpretations: that the recess appointments clause was intended as a limited exception to article III's tenure and salary provisions, or that the tenure and salary provisions are absolute requirements and the recess appointments clause was therefore not intended to extend to vacancies in the federal judiciary.

Note, *Historical Practice* at 1773.

III. CONSTITUTIONAL VALUES

A. The role of values in constitutional interpretation

The first step in the inquiry, examination of the constitutional text, and the second step, exploration of the contemporaneous writings, leave us with an unresolved conflict between two provisions of the Constitution and no real indication of how the Framers intended the two clauses to interact. Thus, the next step in our analysis—weighing the values that animate the two provisions—becomes a vital part of the interpretive process. Only after that step is completed will I turn to the historical practice of using the recess appointment power to fill vacancies in Article III courts. The majority, in contrast, simply omits the step of weighing the competing values, resulting in a truncated analysis based almost entirely on historical practice.

The Supreme Court has consistently observed the principle that in interpreting the Constitution, we are to be mindful of the concerns that animate its various provisions. *See e.g., Virginia v. Tennessee*, 148 U.S. 503, 519, 13 S.Ct. 728, 734, 37 L.Ed. 537 (1893); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 531, 20 L.Ed. 287 (1870); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187, 6 L.Ed. 23 (1824). The classic statement was provided in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 536, 10 L.Ed. 1060 (1842):

> It will, indeed, probably, be found, when we look to the character of the constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact, that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it, which may not allow, even if it does not positively demand, many modifications, in its actual application to particular clauses. And, perhaps, the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.... If, by one mode of interpretation, the right must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode, it will attain its just end and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail.

Id. 41 U.S. (16 Pet.) at 610–12.

Inquiry into fundamental constitutional values is especially important when two provisions of the Constitution are in tension with each other. The Court's attempt to resolve the conflict between the two religion clauses of the First Amendment illustrates the essential process of weighing competing constitutional values. The Establishment Clause and the Free Exercise Clause are both cast in absolute terms, and either of them, if expanded to a logical extreme, would tend to clash with the other. *Walz v. Tax Commission*, 397 U.S. 664, 668–69, 90 S.Ct. 1409, 1411–12, 25 L.Ed.2d 697 (1970). In resolving this tension, the Supreme Court attempts to strike

a balance between the values implicated by the two clauses.[6] In balancing the Establishment Clause and the Free Exercise Clause,

> Both the Court and various commentators have explored the historical background of the first amendment in order to guide interpretation of the two religion clauses, but here as elsewhere, "too literal [a] quest for the advice of the Founding Fathers" is often futile. The historical record is ambiguous, and many of today's problems were of course never envisioned by any of the Framers. Under these circumstances, one can only examine *the human values and historical purposes underlying the religion clauses to decide what doctrinal framework might best realize those values and purposes today.*

L. Tribe, *American Constitutional Law*, § 14-3 (emphasis added).

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976)—a case involving a conflict between the fair trial guarantee of the Sixth Amendment and the free press command of the First Amendment—further illustrates how the Court weighs competing values in interpreting and applying the Constitution. In *Nebraska Press*, the Court was confronted with a "prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged." 427 U.S. at 570, 96 S.Ct. at 2808. The Court adopted a balancing approach, determining "as Learned Hand put it, [whether] 'the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" *Id.* at 562, 96 S.Ct. at 2804. Implicitly, *Nebraska Court* resolves the tension between the First and Sixth Amendments by balancing the values of free speech against those of fair press on a case-by-case basis. The Court concluded that the prior restraint was invalid because the state had not met the "heavy burden" required to justify a prior restraint; thus, in the particular case, the Court decided the balance favored the values embodied in the First Amendment.

We cannot adopt such a case-by-case balancing approach to resolve the tension between the Recess Appointments Clause and Article III, because the question whether recess appointees may exercise the judicial power of Article III demands a categorical yes or no answer.[7] Nevertheless, both

6. In striking the balance, the Court charts a course of neutrality that attempts to preserve the values of autonomy and freedom of religious bodies while avoiding any semblance of established religion. For example, in *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971), the Supreme Court decided whether the Higher Education Facilities Act of 1963, authorizing aid to church-related institutions, violated either the Establishment Clause or Free Exercise Clause of the First Amendment. The Court framed its inquiry as follows: "First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?" *Id.* at 678, 91 S.Ct. at 2096. Thus, although the Court did not explicitly state its approach, it resolved the conflict by examining the Act in light of the values underlying both constitutional provisions.

7. I recognize that whenever possible we should strive to reconcile an apparent conflict in the Constitution. A classic statement of this principle follows:

> What then, becomes the duty of the court? Certainly, we think, so to construe the constitution, as to give effect to both provisions, so far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them, as to preserve the true intent and meaning of the instrument.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 393, 5 L.Ed. 257 (1821). As Chief Justice John Marshall stated in *Marbury v. Madison*, "It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it." 5 U.S. (1 Cranch) 137, 174, 2 L.Ed. 60 (1803). In the present case, however, we confront an unavoidable conflict between two provisions of the Constitution. No accommodation is possible; one clause must yield to the other with respect to judicial appointments. Of course, construing the Recess Appointments Clause not to apply to the judiciary would not render it meaningless; it would still apply with full force to appointments to executive agencies.

Walz and *Nebraska Press* suggest that the resolution of conflict between two provisions of the Constitution requires an evaluation and balancing of underlying values. Our next step, therefore, is to evaluate and balance the competing values underlying the Recess Appointments Clause and Article III.

B. The competing values animating the two clauses

We begin the process of weighing the competing values by considering the values that animate Article III. There can be no doubt that the Framers considered the salary and tenure protections of Article III to be critical institutional safeguards of judicial independence. Recently, in *Pacemaker Diagnostic Clinic of America v. Instromedix*, 725 F.2d 537, 541 (9th Cir.1984) (en banc), our court reaffirmed this fundamental constitutional value: "The attributes of Article III judges, permanency in office and the right to an undiminished compensation, are as essential to the independence of the judiciary now as they were when the Constitution was framed." The Supreme Court stressed the importance of Article III safeguards to judicial independence in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982):

> In sum, our Constitution unambiguously enunciates a fundamental principle—that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

Id. at 60, 102 S.Ct. at 2866; *see also United States v. Will*, 449 U.S. 200, 217–18, 101 S.Ct. 471, 481–82, 66 L.Ed.2d 392 (1980) ("A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.").[8]

In my view, the majority simply fails to take the institutional protections of Article III as seriously as our court did in *Pacemaker* and the Supreme Court did in *Marathon;* indeed, the majority denigrates the tenure and salary provisions when it argues that there are no examples of executive or legislative coercion of a recess appointee. This rationale implies that the institutional protections of Article III are of little consequence because we can rely on the integrity and courage of individual judges to assure judicial independence. The Framers, quite obviously, did not share that view. Rather, they were firm in their conviction that permanency of office and salary protection were crucial institutional safeguards against encroachment on the judicial power by the political branches. As our court stated recently, "[O]ur own experience attests to the substance and reality of [Article III's] guarantees. A separate and independent judiciary, and the guarantees that assure it, are present constitutional necessities, not relics of antique ideas." *Pacemaker*, 725 F.2d at 541.

Moreover, we must preserve not only the reality but also the appearance of judicial independence. Public confidence in the integrity and independence of the courts is imperative, especially when a constitutional confrontation between the judiciary and the political branches creates a national crisis. Such confidence could be threatened if, for example, recess appointees were called upon to participate in a highly charged case involving the constitutional limits on presidential power. The facts of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) provide a thought provoking historical hypothetical. Imagine a recess appointee sitting on a Supreme Court that was otherwise divided, four to four, on the question of the constitutionality of President Truman's steel mill seizure. Imagine further that this hypo-

8. There is extensive scholarly commentary on the relationship between judicial independence and the principle of separation of powers. *See generally* G. Wood, *The Creation of the American Republic, 1776–1787*, 453–63 (1969); Levi, *Some Aspects of Separation of Powers*, 76 Colum.L.Rev. 371 (1976); Note, *Federal Magistrates and the Principles of Article III*, 97 Harv.L.Rev. 1947, 1949 (1984).

thetical justice is courageous and intends to vote his conscience. Were he to believe the President's action in seizing the mills was unconstitutional, the recess appointee would confront the possibility that an infuriated President might withdraw his nomination. If, on the other hand, the justice were to believe the seizure was constitutional, he would find it difficult if not impossible to avoid the appearance that his tie breaking vote had been influenced by the President's power to cut short his tenure on the Court. *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) is another case from our recent past in which public faith in the independence of the judiciary could have been shaken if a recess Supreme Court appointee had provided a swing vote. These historical hypotheticals graphically illustrate the importance of the tenure and salary provisions of Article III as safeguards against institutional destabilization.

Fortunately, we have not had to confront these disturbing scenarios, because circumstances have not yet combined to produce a recess appointment to our highest court during such trying times of national crisis. There are, however, no guarantees against such an occurrence. Entrusting the decision in such cases—where the constitutional limits of presidential power are on the line—to judges whose office depends on whether the President decides to withdraw their nomination, would threaten seriously the ideal of separation of powers. Yet, if the majority's approach prevails, it may take a crisis of the magnitude of *Youngstown* or *United States v. Nixon* to cause us to regret today's decision.

The threat of institutional destabilization posed by recess appointments is not purely hypothetical. History informs us that during the civil rights struggle of the 1960's, political pressures induced recess appointees to avoid politically sensitive cases. A writer of contemporary history has recounted some of the events of that turbulent period:

> [Griffin] Bell and [Walter] Gewin both began service on the Fifth Circuit on October 6, 1961, with interim appointments so they could begin work on the overloaded backlog of cases. But their appointments would not become final until after confirmation hearings by the Senate Judiciary Committee and approval by the Senate the following March. At an initial meeting with [Chief Judge Elbert] Tuttle, Bell suggested that the sensitivity of race cases was such that they might create problems for Gewin at the confirmation hearings.
>
> Tuttle agreed and said he would not assign such cases to Gewin until after confirmation and for the same reason would also withhold such assignments from Bell.

J. Bass, *Unlikely Heroes* 164 (1981). The difficulty with such judicial accommodation to political pressure is that it requires the assignment process itself to depart from strict neutrality and enter the realm of political machination. Yet, a fundamental purpose of Article III was to isolate the judiciary from just such political entanglements.

The strain on judicial independence and the threat to the appearance of independence exemplified by the Fifth Circuit's experience during the struggle for civil rights and the confrontation of Justice Brennan by Senator McCarthy are but two examples of the potentially pernicious effects of departing from the Article III mandate that judicial power be exercised only by judges with permanent tenure and protection against diminution of salary. We have no way of knowing how many other recess appointees may have been shunted away from controversial cases because they were vulnerable to political retaliation for unpopular decisions. Nor do we have any way of knowing if a judge privately succumbs to intense pressure and decides a case in a manner that ensures his confirmation rather than according to the dictates of legal principle and precedent. What we do know is that the constitutional plan of separation of powers rests on clear institutional protections for judicial independence.

The concerns for efficiency, convenience, and expediency that underlie the Recess Appointments Clause pale in comparison. The purpose served by the President's power to fill judicial vacancies during a recess of the Senate is obviously to avoid delay in the administration of justice in federal courts. I recognize that such a recess commission allows a new judge to begin working immediately on a backlog of cases rather than waiting for the Senate to reconvene. There are ways, however, of coping with pressing caseloads without compromising the principle of judicial independence. Because district and circuit judges are largely interchangeable, interdistrict or intercircuit assignments provide an expedient and effective way of dealing with a short term problem. Such transfers are a common practice in the federal judicial system.

When it comes to the Supreme Court, different considerations might come into play. In the event of a freak accident—for example, the deaths of enough Supreme Court Justices to void a quorum—use of the executive's recess appointment power could be one way to deal with an emergency. Congress, however, has the authority to provide for such exigencies in ways that do not compromise judicial independence. When, for example, the Supreme Court is unable to muster a quorum to hear a direct appeal from a district court, it is directed by statute to remand a case for decision by a special panel of the circuit that includes the district from which the appeal was taken. 28 U.S.C. § 2109 (1982); *see also United States v. Aluminium Co. of America*, 148 F.2d 416, 421 (2d Cir.1945) (example of such a special panel). Moreover, in the unlikely event of a true emergency demanding immediate action when the Supreme Court lacks a quorum, the Senate can reconvene in a matter of days, if not hours to perform its constitutional role—giving "advice and consent" to the executive's judicial nominations.

The majority asserts that the Recess Appointments Clause is necessary to avoid "the denial of the important right of access to the courts" and to prevent "the executive from being incapacitated during the recess of the Senate"; it does not, however, cite a single instance when use of the recess appointment power was necessary to achieve those objectives. Indeed, the majority presents no evidence that any President made a recess appointment to ensure the continued functioning of the judiciary through a crisis that could not have been handled by existing Article III judges. With one exception, the federal courts have functioned since 1964 without the assistance of recess appointees. The sole exception is Judge Heen.

Thus, could we set historical practice aside, I believe our decision today would be relatively easy. Given that the language of the two clauses is in conflict and that the intentions of the Framers are unclear, the principles that animate the salary and tenure provisions of Article III—judicial independence and separation of powers—clearly outweigh the concerns of expediency and efficiency that underlie the Recess Appointments Clause. In other words, if we were writing on a clean slate, if we were reviewing Judge Heen's recess commission without history to support it, I find it inconceivable that we would interpret the Constitution as the majority does today—subordinating Article III values to the executive's general power to make recess appointments. With that thought in mind, I turn to the role of historical practice in the constitutional equation.

IV. HISTORICAL PRACTICE

The fourth step of the inquiry—factoring the historical practice of recess judicial appointments into the constitutional analysis—brings into sharp relief the majority's almost exclusive reliance on a unilateral practice of the executive as the justification for finding the practice to be constitutional.

A. The judicial role: Evaluation of historical practice

In two recent cases, *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), and *Marsh v. Chambers*, 463 U.S.

783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), the Supreme Court developed an analytic framework for evaluating historical practice in constitutional interpretation. *Chadha* teaches us that even a long historical pedigree does not conclusively establish the constitutionality of a practice. *Marsh* illustrates that in limited circumstances historical practice may be an accurate guide to the intentions of the Framers. The two cases together establish the principle that the courts must critically evaluate a historical practice before deciding how much weight to accord it in the process of interpreting the Constitution.

In *Chadha*, the Supreme Court resolved a conflict between historical practice and the principle of separation of powers, analogous to the conflict we confront today. At issue was the constitutionality of a statute authorizing one house of Congress to invalidate by resolution a decision of the executive branch made pursuant to congressionally delegated authority. When the Court decided *Chadha*, the one-house veto was a practice of long and continuous standing. *See Chadha*, 103 S.Ct. at 2793 (White, J., dissenting). Yet, that fact did not deter the Court from declaring the practice unconstitutional. In fact, Chief Justice Burger noted that "our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies ...." *Chadha*, 103 S.Ct. at 2781. The teaching of *Chadha* is clear. Historical practice is not irrelevant to Constitutional inquiry, but it will not "save [a practice] ... if it is contrary to the Constitution." *Id.* 103 S.Ct. at 2781.

Chadha does not, I hasten to add, stand for the proposition that historical practice has no role to play in constitutional interpretation. Indeed, *Marsh v. Chambers* is authority that a practice with a lineage that can be traced back to the time of the Framers may serve as a guide to the Framers' understanding of the workings of the Constitution. But *Marsh* also illustrates the proposition that rather than simply accepting the historical practice, courts should evaluate carefully a historical practice dating back to the Framers before deciding its constitutionality.

In *Marsh*, the Court held that the Nebraska legislature's practice of opening each session with a prayer offered by a state-paid chaplain did not violate the Establishment Clause. In reaching that decision, the Court considered the practice of the First Congress, which not only appointed the first legislative chaplain but also drafted and recommended the Bill of Rights for adoption by the states. The Court cited to a uniquely full historical record indicating that the practice was extensively considered and approved by the Framers. *Id.*, 103 S.Ct. at 3335. The bill to appoint a legislative chaplain was extensively debated by the First Congress. Indeed, the bill was opposed by John Jay and John Rutledge on First Amendment grounds. The Court in *Marsh* cited this unique record of debate and opposition as evidence that the "subject was considered carefully and the action not taken thoughtlessly ...." *Id.* Thus, the teaching of *Marsh* is that historical practice is only to be given decisive weight if it is "infuse[d] ... with power" by the considered judgment of the Framers following careful debate. *Id.*

The majority apparently reads *Marsh* as authority for according great weight to the practice of making recess judicial appointments because the practice also dates back to the administration of George Washington. In doing so, the majority overlooks the *Marsh* Court's careful evaluation of the context and characteristics of the practice of appointing legislative chaplains before accepting it as a reliable guide to constitutional meaning. Only after stressing that the practice was carefully debated and adopted by the First Congress, and that the First Congress drafted and proposed the Bill of Rights, did the Court accord the practice substantial weight in interpreting the First Amendment. *Id. Chadha* illustrates the corollary of *Marsh:* even long-standing historical practice should receive

little deference if it sheds no light on the intentions of the Framers.

B. Historical practice and the Framers' intent: No record of considered deliberation

Thus our task is to evaluate critically the historical practice of recess judicial appointments. The majority treats this case as if *Marsh* were controlling rather than *Chadha*. I recognize that the practice we consider today is similar to the practice the Court evaluated in *Marsh* in one important respect: it stretches back to the time of the Framers. There is, however, an equally important difference. President Washington's use of the recess appointment power to confer interim judicial commissions is not accompanied by a record of considered deliberation that gives us meaningful insight into the intentions of the Framers.

In this critical respect, a close comparison of the case here with *Marsh* is instructive. In the case at hand, the historical record fails to inform us whether that the Framers considered the possibility that recess appointments could violate Article III. Indeed, the majority is careful to observe that these appointments by President Washington were made without objection or apparent consideration of the potential conflict with Article III.[9] This blank record stands in sharp contrast with the full record of plenary consideration given by the First Congress to the First Amendment implications of appointing a legislative chaplain. Thus, the early historical practice of recess appointments to the judiciary has not been "infused with power" by the considered judgment of the Framers. As *Marsh* suggests, such a practice is entitled to less deference than a practice that we know was "considered carefully" by the Framers. *Marsh*, 103 S.Ct. at 3335.

Moreover, the first legislative chaplain was appointed by the very same body—the First Congress—that proposed the Bill of Rights. There is no reason to credit George Washington with any special insight into how the Framers intended the recess appointment power of Article II to interact with the salary and tenure provisions of Article III.

There is a ready explanation as to why the public record does not reflect that President Washington's recess judicial appointments were subject to the same careful scrutiny as was the appointment of a legislative chaplain by the First Congress. Unlike the practice approved by the collective action of Congress in *Marsh*, the use of the recess appointment power to confer interim judicial commissions involves the unilateral action of individual Presidents. Although Congress may ultimately confirm a recess appointee, it has no authority or opportunity to review the President's exercise of his recess appointment power because an interim commission is simply not subject to Senate approval.

The distinction between the unilateral historical practice of the executive and the collective actions of the Congress becomes important in the process of assessing the interpretive weight of the practice. Congress is a deliberative body composed of peers. An action taken by Congress almost necessarily is subject to constitutional challenge and reasoned debate by the members of that body. A unilateral action by the President, in contrast, can be implemented without debate or discussion. Although the majority is correct in observing that Alexander Hamilton and John Jay were members of Washington's first cabinet, the historical record does not tell us whether Hamilton and Jay had even considered the question whether Article III limited the executive's recess appointment power to non-judicial offices, or, if they did, whether they had occasion to express their views, whatever they may have been, in the privacy of a Cabinet meeting or in conversation with the President alone.

What we do know is that Hamilton and Jay were faced with different concerns as

9. The Columbia Note agrees: "At no time during this early period did opposition to the practice make its way into the public record, either in Congress or the courts." Note, *Historical Practice*, at 1776.

members of Washington's cabinet than they were as architects of the Constitution and authors of *The Federalist*. Members of a cabinet have political agendas, and the fact that they may not have spoken out against a recess judicial appointment does not necessarily mean that they considered it to be constitutional. As members of a national administration, they very well may have been preoccupied with other matters deemed more pressing at the time; they were, after all, faced with a wide range of problems as members of the first administration of a new government. Voicing objection about the constitutionality of recess judicial commissions may not have been very high on their political agenda. Moreover, the realities of getting the job done and accommodating various contending factions do not lend themselves to the same process of reasoned deliberation and debate as did the framing of our fundamental charter or of the Bill of Rights. Finally, members of either political branch are not in the same position as sitting Article III judges faced with a decision affecting the interests of real parties engaged in a concrete dispute.

Recently, Justice Rehnquist cited a clear example of the dramatic change in attitude toward the meaning of the Constitution that can accompany an individual's switch in roles from holding office in one of the political branches to the judiciary:

> [I]n the fall of 1864, the constitutionality of the so-called "greenback legislation" which the government had used to finance the war effort was headed for a Court test, and Lincoln was very much aware of this fact. He decided to appoint his Secretary of the Treasury, Salmon P. Chase, who was in many respects the architect of the greenback legislation, saying to a confidant that "We wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders. We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known" 2 Warren 401.

Address by Associate Justice Rehnquist, "Presidential Appointments to the Supreme Court," University of Minnesota College of Law (October 19, 1984) (reported in N.Y. Times, October 20, 1984 § 1, at 1, 9.). As Justice Rehnquist reports, the changed attitude that accompanied Chase's new role thwarted Lincoln's intentions:

> The ultimate irony in Lincoln's effort to pack the Court was the Court's first decision in the so-called Legal Tender Cases, *Hepburn v. Griswold*, 8 Wall. 603 [19 L.Ed. 513]. In 1870 the Court held, in an opinion by Chief Justice Chase, who had been named Chief Justice by Lincoln primarily for the purpose of upholding the greenback legislation, that this legislation was unconstitutional.... Chief Justice Chase's vote in the legal tender cases is a textbook example of the proposition that one may look at a legal question differently as a judge than one did as a member of the Executive Branch. There is no reason to believe that Chase thought he was acting unconstitutionally when he helped draft and shepherd through Congress the greenback legislation, and it may well be that if Lincoln had actually posed the question to him before nominating him as Chief Justice, he would have agreed that the measures were constitutional. But administrators in charge of a program, even if they are lawyers, simply do not ponder these questions in the depth that judges do, and Chase's vote in the legal tender cases is proof of this fact.

Id. Even if Hamilton and Jay—in their capacity as members of the first Cabinet—had directly confronted the question of the constitutionality of recess appointments to the judiciary, they would not have faced a concrete controversy exposed to the light and heat of the adversarial process.[10]

10. For the same reason, the majority's observation that individual judges did not object to their own recess appointments is of little consequence. The recess appointee has no formal opportunity and little incentive to consider in

To sum up, *Marsh* establishes that a lineage that began with the Framers is a necessary condition that must be met for a historical practice to be considered a reliable guide to the intentions of the Framers. Just as clearly, however, such a lineage is not a sufficient condition. If the Framers adopted a practice carelessly or without attention to a possible constitutional infirmity, then the lineage is entitled to little weight in constitutional analysis. Although the practice of recess judicial commissions does stretch back to the time of the Framers, there is no record that the practice was adopted through a process of reasoned deliberation. After evaluating the practice in light of the standards applied by the Supreme Court in *Marsh* and *Chadha*, I cannot escape the conclusion that the early historical practice is not a reliable indicator that the Framers intended the recess appointment power to extend to vacancies in Article III courts.

C. *Historical practice and structural accommodation: Judicial silence and individual liberties*

Even though the historical practice of recess judicial appointments is not an accurate guide to the Framers' intentions, it could still be argued that the judiciary should defer to the executive's longstanding practice on the theory that it constitutes a "structural accommodation" between the various branches of government. One commentator articulated the theory as follows:

> Because the Constitution is a broad charter of government and not a statute, it establishes a flexible framework for the exercise of national power. The legislative, executive, and judicial branches are not hermetically sealed units with exactly defined powers, but are interlocking spheres of influence, each with a core of constitutionally assigned functions and enumerated powers. Thus, situations arise in which it is charged that one branch's interpretation of the scope of its authority exceeds the limits imposed by either the constitutional text or structure. In such situations, it may be possible to show that similar exercises of power have occurred repeatedly in the past and have not been challenged or openly opposed by the other two branches. A court may be offered this evidence with the argument that historical practice has "settled" the constitutional question at issue, regardless of whether the practice took place early enough in the nation's history to be capable of providing evidence of original intent.

Note, *Historical Practice*, at 1777–78. The Supreme Court's decision in *Chadha* establishes that the mere fact that historical practice is of long standing does not relieve the judiciary of the responsibility of assessing the practice and measuring it against constitutional standards. In the case at hand, two reasons emerge for concluding that the historical practice of recess judicial appointments is not entitled to judicial deference as evidence of a "structural accommodation". First, judicial silence cannot be interpreted as acquiescence in the constitutionality of a practice because Article III courts cannot react to an encroachment on their separate powers until presented with the issue in a concrete case or controversy. Second, because Article III's tenure and salary provisions are designed as safeguards of individual as well as institutional interests, the courts have a duty to prevent erosion of those safeguards that transcends the structural importance of an independent judiciary.

1. Inaction by the judiciary cannot represent acquiescence in a structural accommodation.—The judiciary's role in our system of checks and balances is a passive one. Because of the case or controversy requirement of Article III, federal courts can only act when a dispute is presented to them by parties with a concrete stake in the outcome. The courts do not initiate law suits; rather they react to actions filed by parties. Even when deciding cases or controversies, "the judicial branch acts primarily on the litigants before the court." *Pacemaker*, 725 F.2d at 542.

depth the constitutionality of his own appointment

In contrast, the political branches, the legislature and the executive, are both active. Both the President and Congress have the power to initiate action to define operationally their role in the constitutional scheme of separate and divided powers. Thus, historical acquiescence of the political branches in a practice of uncertain constitutional validity can arguably be defended as a "structural accommodation" that ought not be upset by the courts. *Cf.* Note, *Historical Practice*, at 1773. With the political branches, this "structural accommodation" can, at least to some extent, be inferred from silent acceptance by one political branch in the face of action by the other. The important distinction is that silence by the courts cannot be construed as acquiescence in the constitutionality of even a longstanding practice.

This distinction sheds light on two cases cited by the majority for the broad proposition that historical practice is entitled to judicial deference. It is true that in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936), the Court did in part rely on historical practice in upholding the Congressional delegation to the President of the power to declare illegal the provision of arms to nations involved in the Chaco conflict. *Id.* at 327–29, 57 S.Ct. at 224–25. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624 (1928), also involved a constitutional challenge to the delegation of power by Congress to the executive.[11] Because both cases involve the constitutionality of Congressional delegations of authority to the President, they are distinguishable from the instant case, which involves the independence of the passive branch, the judiciary.[12]

In sum, in our constitutional system the judiciary is entrusted with the ultimate responsibility for interpreting the Constitution, including the authority to review the constitutionality of actions by the political branches of government. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60

11. Despite broad language in *Curtiss-Wright* to the effect that "an impressive array of legislation ... enacted by nearly every Congress from the beginning of our national existence ... must be given unusual weight," 299 U.S. at 327, 57 S.Ct. at 224, a careful examination of Justice Sutherland's opinion reveals that the historical factor was invoked only after a long and careful analysis of constitutional policies and values. Indeed one influential commentator described the opinion as "theoretical" and observed that, "[a]lthough the decision might have been bottomed upon narrower grounds, Justice Sutherland accepted the case as an invitation to propound certain of his long-held convictions about the source and distribution of the federal government's foreign affairs power." L. Tribe, *American Constitutional Law § 4–2*, at 159 (1978). *Curtiss-Wright* is not authority for the proposition that longstanding historical practice should be decisive and end further inquiry into fundamental constitutional values. Quite the contrary, *Curtiss-Wright* stands squarely in the tradition of careful constitutional interpretation that necessarily involves close scrutiny of the values that animate the provisions of the Constitution.

Similarly in *J.W. Hampton*, Chief Justice Taft undertook a careful analysis of the policies and principles underlying the separation of powers and concluded that Congressional delegation of the power to fix certain tariff rates was consistent with those principles. 276 U.S. at 405–411, 48 S.Ct. at 350–353. Only after that inquiry was complete did Chief Justice Taft turn to a consideration of historical practice. *Id.* at 412, 48 S.Ct. at 353. Again a close reading of the decision leads to the conclusion that the process of constitutional interpretation is not complete absent careful attention to constitutional values and principles.

12. Moreover, all of the cases cited by the Columbia Note in support of the structural accommodation theory involve the relationship between the political branches—the executive and the legislature—and not the independence of the judiciary. *See* Note, *Historical Practice*, at 1778–80. For example, the *Pocket Veto Case*, 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894 (1929), involved the longstanding practice of Presidents of using pocket vetoes to avoid Congress' override power. *Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981), concerned the authority of the President to settle claims by United States nationals against Iran in the absence of explicit Congressional authorization. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), involved the power of Congress to create a national bank. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), in which the structural accommodation argument was raised by Justice Frankfurter in dissent, implicated the President's power to seize steel mills without authority delegated by Congress.

(1803). Thus, the brute historical fact that the executive or legislature has engaged in a practice, even for an extended period, cannot by itself establish the constitutionality of the practice. This is as it must be in the constitutional scheme of things. Because the judicial branch is passive, it cannot react to an assertion of power by the political branches until third parties present the courts with a concrete case or controversy. Judicial silence simply cannot be construed as judicial acquiescence.

2. Judicial deference to structural accommodation is not appropriate when individual rights are at stake.—There is a second reason that the historical practice of recess judicial appointments should not receive deference from the courts as a structural accommodation. Article III's protections were not only designed to protect the judiciary as an institution; the constitutional guarantees of life tenure and undiminished compensation were also intended to protect individuals. Justice Douglas emphasized this important function of Article III when he wrote, "The safeguards accorded Art. III judges were designed to protect litigants with unpopular or minority causes or litigants who belong to despised or suspect classes." *Palmore v. United States*, 411 U.S. 389, 412, 93 S.Ct. 1670, 1684, 36 L.Ed.2d 342 (1973) (Douglas, J., dissenting); *see also Glidden v. Zdanok*, 370 U.S. 530, 536, 82 S.Ct. 1459, 1465, 8 L.Ed.2d 671 (1962). Justice Douglas' point was recently reinforced by our court, when we observed:

> [S]eparation of powers protections, in some cases, have two components. One axis reaches to the person affected by government action and encompasses his or her relation to a constitutional branch; the other axis runs from each governmental branch to the others to insure separation and independence in the constitutional structure.

Pacemaker Diagnostic Clinic of America v. Instromedix, 725 F.2d 537, 541 (9th Cir. 1984) (en banc). In *Pacemaker*, we concluded that, subject to limited exceptions, the federal litigant has a personal right to demand Article III adjudication. *See Pacemaker*, 725 F.2d at 541.

Pacemaker upheld the constitutionality of the Magistrates Act, which authorized adjudication by magistrates without Article III protections but with the consent of the parties. *Id.* at 542. We also noted in *Pacemaker* that the Supreme Court had expounded on the existence of other limited exceptions to Article III in *Marathon*, but none of those exceptions applies here. *Id.* at 541.[13] Moreover, we expressly negated any implication that our decision in *Pacemaker* reached criminal cases. *Id.* In cases involving a criminal defendant, Article III protections should be most zealously observed because individual liberty is directly at stake. Today's decision represents the first time any court other than the Second Circuit in *United States v. Allocco*, 305 F.2d 704 (2d Cir.1962), has sanctioned the adjudication of a criminal case in an Article III court by a judge without Article III protections.

In sum, whatever role a process of structural accommodation may have to play in adjusting the relationship between the political branches, it is clear that judicial silence in the face of action by the executive or legislative branches cannot be construed as a waiver of the constitutional rights of individuals.[14] Our system affords each in-

13. *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1981), established the general principle that parties to a case or controversy in a federal forum are entitled to have the cause determined by judges with the salary and tenure guarantees of Article III. The *Marathon* Court cataloged three limited exceptions to that general principle: territorial courts, military tribunals, and "public rights" cases. 458 U.S. at 64–70, 102 S.Ct. at 2868–2871. *See also* Note, *Historical Practice*, at 1758.

14. The Columbia Note argues that the personal rights component of Article III is secondary to its structural component. Note, *Historical Practice*, at 1788–90. The Note acknowledges this court's decision in *Pacemaker*, *id.* at 1788 & n. 174, but argues that the fact that a litigant can raise the lack of Article III judicial power for the first time on appeal and the fact that a court may raise the issue sua sponte are evidence that

dividual litigant the opportunity to vindicate his or her personal rights through the judicial process. The political branches cannot extinguish such rights by establishing "adverse possession" through long-standing historical practice.

In cases where individual rights are at stake, the Supreme Court has not hesitated to affirm fundamental constitutional principles and vindicate those rights even in the face of an intimidating historical practice. One of the most renowned such cases is *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).[15]

In *Brown*, the Supreme Court overturned the hoary historical practice of segregation, long rationalized by courts under the "separate but equal" doctrine. The *Brown* Court faced a practice that not only had "been inextricably woven into the fabric of our nation," in the words of today's majority, but had received the imprimatur of the Supreme Court itself. *See Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). Racial segregation began at a time when the drafters of the Fourteenth Amendment were still alive; indeed the same Congress that authored the Fourteenth Amendment segregated the schools in the District of Columbia. *See* R. Berger, *Government by Judiciary* 117–33 (1977). But the Supreme Court in *Brown* was not daunted by the undisputed fact that the historical practice of racially segregating schools had been accepted as consistent with the Constitution for generations. The *Brown* Court realized that constitutional tradition demands that the courts look beyond the fact of historical acceptance when a practice is challenged as unconstitutional. Our constitutional heritage requires courts to look to the values and principles that breathe life and meaning into the words of the Constitution. When those principles demanded that segregation be struck down as inconsistent with the constitutional mandate of equal protection of the laws, the *Brown* Court did not hesitate to vindicate the Constitution, despite a formidable combination of historical practice and long-standing precedent. As one commentator concluded, "*Brown v. Board of Education*

a jurisdictional and not a personal claim is involved. This argument is clearly fallacious. The fact that a claim of lack of Article III power shares some characteristics with jurisdictional claims does not demonstrate that it does not share other characteristics with personal claims. For example, in *Pacemaker* our court relied on individual consent to validate the Magistrates Act, but waivability is a characteristic of personal rights and not jurisdictional requirements. *Pacemaker* makes the law in this circuit clear: a claim that an adjudication made in violation of the salary and tenure provisions of Article III is both a personal claim and a jurisdictional one.

15. Another individual liberties case involving a clash between historical practice and constitutional values is *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941). *Bridges* also resembles the case we decide today because the Court was similarly faced with a conflict between two provisions of the Constitution. In *Bridges* the Court confronted the apparent conflict between a state's interest in assuring criminal defendants a fair and impartial trial as supported by the Sixth Amendment and the First Amendment's guarantee of freedom of the press. A California trial court had punished as contempt the publication of a newspaper editorial and a telegram criticizing its proceedings in labor dispute. As Justice Black wrote, "If the inference of conflict ... be correct, the issue before us is of the very gravest moment. For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Id.* at 260, 62 S.Ct. at 192.

The approach of today's majority to the resolution of such a conflict—deference to historical practice—was suggested by Justice Frankfurter in his dissent. He believed that the case could be resolved by recourse to "the uninterrupted course of constitutional history ...." *Id.* at 279, 62 S.Ct. at 201 (Frankfurter J., dissenting). Justice Frankfurter traced the authority of the courts to impose prior restraints on the press through the contempt power back to the common law which "was written into the Judiciary Act of 1789 ... by Oliver Ellsworth, one of the framers of the Constitution." *Id.* at 285, 62 S.Ct. at 204. The *Bridges* majority rejected this contention, focusing on the values the framers were attempting to realize in the First Amendment freedom of speech and of the press. *Id.* at 264–65, 62 S.Ct. at 194–95. While never explicitly resolving the potential conflict between free press and fair trial, the Court found that the extrajudicial statement did not represent "a clear and present danger" of interference with the administration of justice, and hence found the imposition of contempt to violate the First Amendment. *Id.* at 272–73, 62 S.Ct. at 198–99.

clearly demonstrates that even a long, widespread, continuous, and *judicially approved* practice, in an area of doubtful constitutional meaning, will receive no judicial deference as evidence of a structural accommodation when it is alleged to have resulted in a denial of individual liberties." Note, *Historical Practice*, at 1783.

The individual rights component of Article III thus provides a second distinction between the historical practice of recess judicial appointment from the historical practices considered in the majority's cases, *Curtiss-Wright* and *J.W. Hampton*.[16] As I have already noted, *Curtiss-Wright* and *J.W. Hampton* both involved the constitutionality of Congressional delegation of power to the President. Neither case implicated individual rights.

Thus, my evaluation of the early historical practice of making recess judicial appointments leads me to conclude that, while the practice offers some support for the majority's decision that the Recess Appointments Clause carves out an exception to Article III, the strength of that support is quite limited. Recess appointments are unilateral actions by the President; they lack the deliberative quality that gives increased weight to the early enactments of the First Congress. The original recess appointments by President Washington were apparently made without the open debate and discussion that would have "infused them with power" in the language of *Marsh*. Moreover, less weight should be given to the historical practice of recess appointments to the judiciary than was given to the historical practice of delegating power to the President in *Curtiss-Wright* and *J.W. Hampton*, because those cases involved "structural accommodations" between the active political branches rather than with the judiciary, the passive branch. Finally, recess judicial appointments implicate individual as well as institutional interests. Even when the political branches alone are involved, *Chadha* informs us that longstanding historical practice is not decisive. Clearly, the historical practice of recess judicial appointments is entitled to far less weight than the historical practice considered in *Marsh;* despite the age of the practice, it teaches us very little, if anything, about the Framers' intentions. I see no reason why the executive's practice of using the recess appointment power to fill judicial vacancies should be entitled to any more weight than the practice held unconstitutional in *Chadha*.

V. CONCLUSION

To summarize the results of the four-part inquiry, the first two steps—a review of the text of the Constitution and the contemporaneous writings of the Founders—offer little guidance for our decision. The two remaining factors—constitutional values and historical practice—come down on opposite sides of the scale, but the principles of separation of powers and judicial independence that animate Article III heavily outweigh the concerns of expediency and efficiency that underlie the Recess Appointments Clause. With the scales tipped sharply in favor of Article III by the fundamental constitutional values at stake, the historical practice fails to provide enough insight into the intentions of the Framers to restore the balance, much less tip it in favor of the Recess Appointments Clause. In the last analysis, like Professor Hart, "I

16. The majority also cites *Stuart v. Laird*, 5 U.S. (1 Cranch) 298, 2 L.Ed. 115 (1803), but as in *Curtiss-Wright* and *J.W. Hampton*, the historical practice considered in *Stuart v. Laird* does not implicate individual constitutional rights. *Stuart v. Laird* is a one page opinion by Justice Patterson involving the question of whether Justices of the Supreme Court could also serve as circuit justices, consistent with the constitutional limitations of the original jurisdiction of the Supreme Court. Justice Patterson responded, "To this objection, which is of recent date, it is sufficient to observe, that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistable answer, and has indeed fixed the construction." *Id.* 5 U.S. (1 Cranch) at 309. The practice, however, had already been eliminated by amendment of the Judiciary Act in 1801, and Justice Patterson's final observation was, "Of course, the question is at rest, and ought not now to be disturbed." *Id.* Although Justice Patterson's terse remarks are somewhat cryptic, they surely cannot be read to foreclose consideration of constitutional values when a longstanding historical practice is challenged.

cannot believe that the Constitution contemplates that any Federal judge ... should hold office, and decide cases, with all these strings tied to him."

I recognize that the only other court that has considered the question we decide today reached the same result as the majority. In *United States v. Allocco*, 305 F.2d 704 (2d Cir.1962), the Second Circuit also held that the Recess Appointments Clause carves out an exception to Article III.[17] Like today's majority, however, the Second Circuit assumed without analysis that historical practice was dispositive of the question.

The path chosen by our court and the Second Circuit in *Allocco* is a tempting one. Our burden would be far lighter if we could avoid the trying task of weighing constitutional values against historical practice in a struggle to interpret the Constitution faithfully. Simple deference to historical practice is an easy way to resolve deep conflicts.

Although a serious clash between historical practice and constitutional principle may be a rare occurrence, we are not without guidance from the Supreme Court as to how we should proceed. Our enterprise today is part of a long tradition of constitutional interpretation, one that has always involved the evaluation of both constitutional values and historical practice. In *Chadha*, the Court interpreted the Constitution so that its fundamental purposes would be fulfilled, despite the intimidating reality of a longstanding historical practice. In *Marsh v. Chambers*, the Court deferred to a practice that reflected the Framers' carefully considered assessment of its constitutionality. In *Brown v. Board of Education*, where individual rights were at stake, the Court chose fundamental constitutional values over a deeply rooted and intractable historical practice. Thus, the lesson of our constitutional history is that historical practice is but one guide to constitutional meaning. When a fundamental constitutional value is in conflict with historical practice, the Constitution must triumph and practice must give way to principle.

Today we must choose between Article III and the Recess Appointments Clause. We must also choose between deference to the historical practice of many chief executives and vindication of the fundamental constitutional values of judicial independence and separation of powers. These choices are not easy, but they must be made. And when we choose with reverence for the Constitution and respect for our proud heritage of constitutional interpretation, our choices are ultimately clear. The fundamental principle of separation of powers must prevail over a peripheral concern for governmental efficiency, and core constitutional values must prevail over uncritical acceptance of historical practice.

UNITED STATES of America,
Plaintiff-Appellant,

v.

Ricardo R. GARCIA,
Defendant-Appellee.

UNITED STATES of America,
Plaintiff-Appellant,

v.

Antonio G. CARDENAS, Jr.,
Defendant-Appellee.

Nos. 83-3092, 83-3093.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 5, 1984.

Decided Jan. 14, 1985.

The Government appealed from an order of the United States District Court for

17. Significantly, the *Allocco* decision in 1962 was made without the benefit of the Supreme Court's recent decisions in *Chadha*, *Marsh*, and *Marathon*. The two student notes reach the same result as today's majority and the Second Circuit in *Allocco*. *See* Note, *Historical Practice*; Note, *Recess Appointments*.

ception" for judges appointed under the recess power of Article II. This argument appears to have been rejected by Hamilton in the Federalist No. 78.[9] It seems not to have occurred to Congress in 1795 when Chief Justice Rutledge was appointed by President Washington under the recess power, although the Senate later refused to confirm his nomination. 1 Warren, The Supreme Court in United States History, 129–139 (rev. ed. 1935); Reporter's Note, Ex parte Ward, 173 U.S. 452, 19 S.Ct. 459, 43 L.Ed. 765 (1899). 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. H.Comm.Jud., Recess Appointment of Federal Judges (1959). 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, see S.Res. 334, 86th Cong., 2d Sess. (1960), it did not challenge the President's *power* to make such appointments. As Senator Hart, the sponsor of the Resolution, noted on the floor:

> "If there ever was ground for the argument that the more specific language of article III of the Constitution should be construed as excluding judicial appointments from the general authorization given the President in article II, time has answered it. The President does have such power and this resolution does not argue otherwise." 106 Cong. Rec. 18130 (1960).

Although Article III incorporates certain protections for permanent federal judges considered vital to their independence, including life tenure, it cannot be said that judicial offices must remain vacant despite the existence of the recess power, because judges who might be appointed thereunder do not have life tenure. The evils of legislative and executive coercion which petitioner foresees have no support in our nation's history. This hypothetical risk must be weighed against the danger of setting up a roadblock in the orderly functioning of the government which would result if the President's recess power were limited by petitioner's interpretation. See 2549–2553 infra. 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.

III.

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. He urges that the recess power was never intended to apply to *all* vacancies; that in point of time it may be exercised only when the Senate has adjourned; and, in the plain language of the Constitution, it may be used only to fill vacancies which "happen during the Recess of the Senate." We are informed that Alexander Hamilton, in the Federalist No. 67, stated that the recess power was created for "the purpose of establishing an auxiliary method of appointment," in cases where "the general method was inadequate." Petitioner suggests, therefore, that if a vacancy occurs when the Senate is in session, the "general method" of appointment, i. e., nomination by the President with the advice and consent of the Senate, *is* adequate. In sum, we are told that the recess power can be used only if a vacancy *arises at a time* when only the

9. "As to the mode of appointing the judges; this is the same with that of appointing the officers of the Union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition." Hamilton, Federalist No. 78.

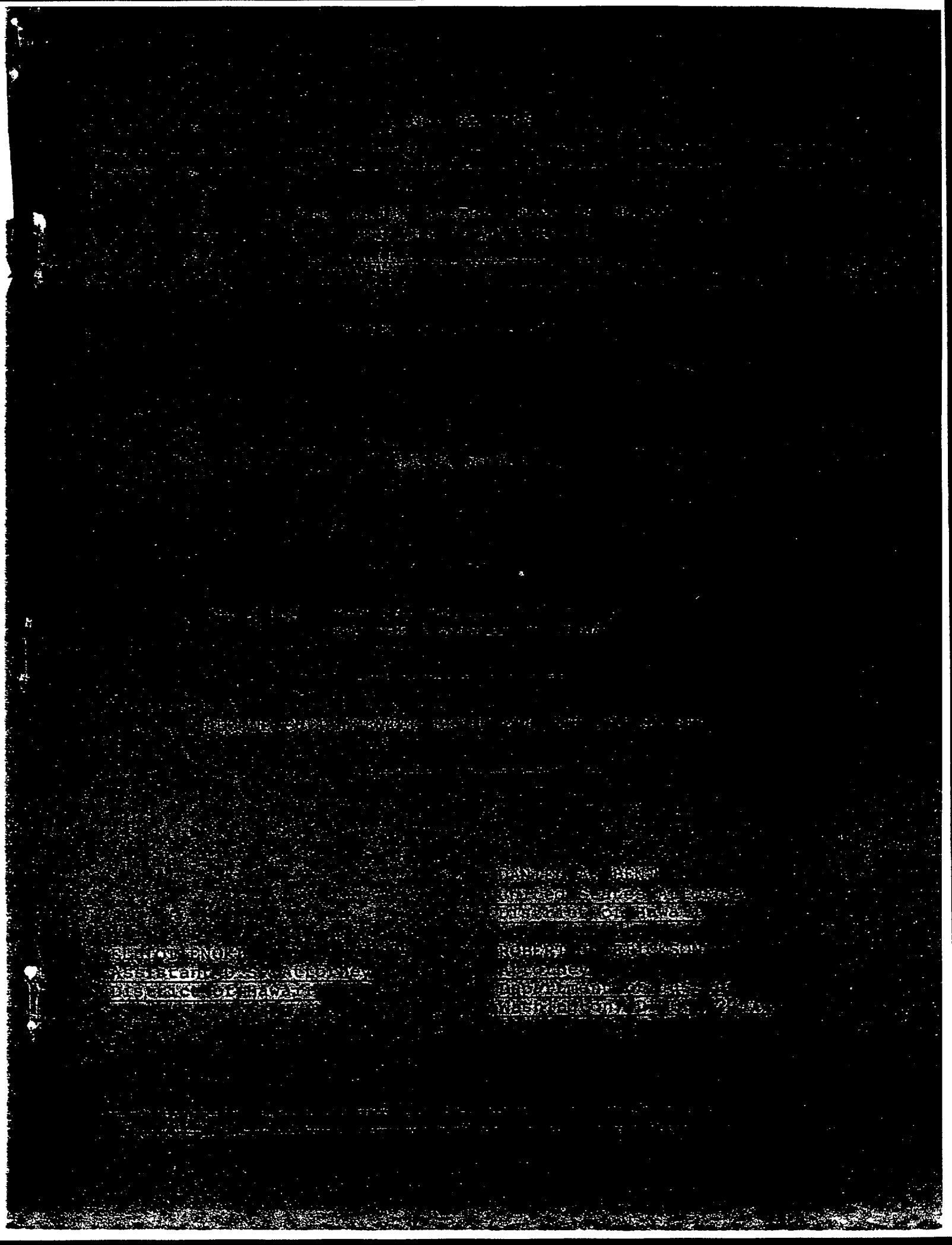

TABLE OF CONTENTS

CITATIONS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1028

UNITED STATES OF AMERICA,

Appellee

v.

JANET WOODLEY,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

SECOND SUPPLEMENTAL BRIEF FOR THE UNITED STATES

On October 25, 1982, this Court sua sponte requested the parties to file supplemental briefs addressing the question whether the presiding judge at appellant's trial, who was sitting by virtue of a recess appointment, was qualified to exercise the judicial power of an Article III court. We thereafter noted in our supplemental brief that the practice of filling vacancies on the Supreme Court and lower federal courts by means of recess appointments has been common from the earliest days of the Republic (Govt. Supp. Br. 5-6). */ In response, the Court

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*/ The practice of making recess appointments to Article III (continued)

directed on June 27, 1983, that the government provide a complete roster of all recess appointees to Article III courts since the ratification of the Constitution.

The following listing was compiled from a search of the individual files maintained by the Office of the Deputy Attorney General for each federal judicial appointee. According to the curator, these files contain the most accurate and complete records available. However, the records for 18th and 19th Century judicial appointees, which have been reconstructed from documents originally maintained by the State Department, are sometimes not as detailed as those records maintained for 20th

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counts dates back to 1789 when President Washington appointed Cyrus Griffin and William Paca to district judgeships under the Recess Appointments Clause of the Constitution. As we argue in our supplemental brief (Govt. Supp. Br. 5-7), the long tradition that followed -- especially as developed in the early days of the Republic when the farmers of the Constitution were active in the national government -- unequivocally demonstrates that judges who sit pursuant to recess appointments may constitutionally exercise the same judicial power as judges who are nominated by the President and confirmed by the Senate.

Since our supplemental brief was filed, the Supreme Court has reached an analogous result in Marsh v. Chambers, No. 82-23 (July 5, 1983). There, the claimant challenged the Nebraska Legislature's practice of hiring a chaplin and commencing each of its sessions with a prayer as violative of the Establishment Clause of the First Amendment. Rejecting this claim, the Court took note of a similar congressional tradition that had continued without interruption for almost 200 years since the First Congress, which also drafted the Bill of Rights, sat (slip op. 3-5). Thus, the Court stated (id. at 6):

> [H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress -- their actions reveal their intent.

So too, the long and unbroken tradition of recess judicial appointments attests to its constitutional origins.

Century appointees. Accordingly, there was occasionally insufficient information upon which to calculate the amount of time a judicial position was vacant prior to a particular recess appointment.

The following compilation, which contains a listing of 46 active or senior judges and 263 inactive judges who have received recess appointments, is divided into five categories. The first three categories, relating to the appointee's name, the court to which he was appointed, and the date of the recess appointment, are self-explanatory. The "Action" category includes information on whether the recess appointee was confirmed or rejected by the Senate or resigned upon the expiration of the recess appointment and the date of such action. Finally, the "Duration of Vacancy" category measures the time between the creation of a judicial vacancy and the making of a recess appointment. In computing this time-frame, three rules of thumb have been employed: (1) in instances of newly created judgeships, the computation has been based on the effective date of the statute authorizing the judicial positions; (2) in the case of successive recess appointments, the computation has been made with reference to the date of the first recess appointment in the series; and (3) in cases involving relatively lengthy hiatuses, the period has been rounded off to the nearest week or month to facilitate ease of reporting.

In our view, the attached Addendum summarizing the long standing practice of making recess appointments to Article III counts, together with the legal arguments presented in our

supplemental brief, convincingly demonstrates that Judge Heen was constitutionally empowered to preside over appellant's trial.

CONCLUSION

For the reasons set forth in our opening and supplemental briefs, appellant's convictions should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the Second Supplemental Brief for the United States were served by mail on appellant's counsel at the following address:

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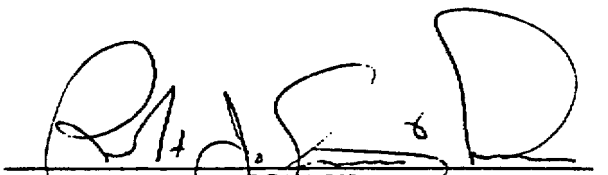

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A D D E N D U M

RECESS APPOINTMENTS TO ARTICLE III COURTS

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
1.	Abbott, Edmund, C.	D.N.M.	7/5/1910	Comm. never issued	6 mos.
2.	Adams, Elmer B.	E.D. Mo.	5/17/1895	Confirmed 12/9/1895	None
3.	Adams, Elmer B.	CA 8	5/20/1905	Confirmed 12/12/1905	26 days
4.	Adams, George B.	S.D.N.Y.	8/30/1901	Confirmed 12/17/1901	None
5.	Adler, Simon L.	W.D.N.Y.	5/19/1927	Confirmed 1/16/1928	11 wks.
6.	Allen, William J.	S.D. Ill.	4/18/1887	Confirmed 1/19/1888	22 days
7.	Allgood, Clarence W.	N.D. Ala.	9/23/61	Confirmed 2/5/1962	4 mos.
8.	Allred, James V.	S.D. Tex.	7/11/1938	Confirmed 2/16/1939	6 wks.
9.	Almond, James L.	Customs & Patents Appeals	10/23/1962	Confirmed 6/28/1963	11 days
10.	Alschuler, Samuel	CA 7	8/16/1915	Confirmed 1/16/1916	3 yrs, 10 mos.
11.	Amidon, Charles F.	D.N.D.	8/31/1896	Confirmed 2/18/1897	52 days

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
12.	Anderson, Harry B.	W.D. Tenn.	9/12/1925	Confirmed 1/29/1926	9 wks.
13.	Andrews, Maurice N.	N.D. Ga.	10/21/1949	Rejected by Senate, 8/9/1950	None
14.	Archbald, Robert W.	M.D. Pa.	3/29/1901	Confirmed 12/17/1901	27 days
15.	Atkinson, George W.	Ct. of Claims	4/15/1905	Confirmed 1/16/1906	5 days
16.	Baker, William E.	N.D. W. Va.	4/4/1921	Confirmed 5/3/1921	8 mos.
17.	Ballard, Bland	D. Ky.	10/16/1861	Confirmed 1/22/1862	Unavailable
18.	Barbour, Phillip P.	E.D. Va.	10/8/1830	Confirmed 12/16/1830	17 days
19.	Bard, Guy K.	E.D. Pa.	12/20/1939	Confirmed 4/24/1940	13 1/2 wks.
20.	Barksdale, Alfred D.	W.D. Va.	12/19/1939	Confirmed 2/1/1940	None
21.	Barnes, David L.	D. R.I.	4/30/1801	Confirmed 1/26/1802	10 wks.
22.	Bastian, Walter M.	D. D.C.	10/23/1950	Confirmed 12/14/1950	None
23.	Bastian, Walter M.	D.C. Cir.	9/20/1954	Confirmed 12/2/1954	10 weeks

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
24.	Bazelon, David L.	D.C. Cir.	10/21/1949	Confirmed 2/8/1950	11 wks.
25.	Beatty, James H.	D. Idaho	3/7/1891	Confirmed 2/4/1892	7 mos.
26.	Bell, Griffin B.	CA 5	10/5/1961	Confirmed 2/5/1962	5 mos.
27.	Bingham, John A.	S.D. Fla.	6/4/1863	Recess Appt. Exp., 7/4/1864	Unavailable
28.	Bland, Theodorick	D. Md.	11/23/1819	Confirmed 1/5/1820	5 mos.
29.	Blatchford, Samuel	S.D.N.Y.	5/3/1867	Confirmed 7/16/1867	None
30.	Boarman, Alexander	W.D. La.	5/18/1881	Confirmed (date unavail.)	11 wks.
31.	Boice, Henry	W.D. La.	5/9/1849	Confirmed 8/2/1850	Unavailable
32.	Bonsal, Dudley B.	S.D.N.Y.	10/5/1961	Confirmed 3/16/1962	4 1/2 mos.
33.	Borah, Wayne G.	E.D. La.	10/3/1928	Confirmed 12/17/1928	4 mos.
34.	Boreman, Herbert S.	CA 4	10/17/1958	Confirmed 6/16/1959	7 mos.
35.	Bourne, Benjamin	D. R.I.	10/13/1796	Confirmed 12/22/1796	6 wks.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
36.	Bowen, Crate D.	S.D. Fla.	5/31/1928	Declined Appt.	5 1/2 mos.
37.	Boyd, James E.	W.D.N.C.	7/11/1900	Confirmed 1/9/1901	2 yrs.
38.	Boyle, John	D. Ky.	10/20/1826	Confirmed 2/12/1827	5 1/2 mos.
39.	Boynton, Thomas J.	S.D. Fla.	10/19/1863	Confirmed 1/20/1864	16 wks.
40.	Brennan, William J.	Sup. Ct.	10/15/1956	Confirmed 3/19/1957	None
41.	Brewster, Henry L.	N.D. Tex.	10/5/1961	Confirmed 3/16/1962	4 1/2 mos.
42.	Brooks, George W.	E.D.N.C.	8/19/1865	Confirmed 1/22/1866	Unavailable
43.	Brown, Addison	S.D.N.Y.	6/2/1881	Confirmed 10/14/1881	None
44.	Brown, Arthur L.	D. R.I.	10/15/1896	Confirmed 12/15/1896	11 wks.
45.	Bryant, Frederick H.	N.D.N.Y.	5/19/1927	Confirmed 12/19/1927	11 wks.
46.	Buffington, Joseph	CA 3	9/25/1906	Confirmed 12/11/1906	3 mos.
47.	Burns, Louis H.	E.D. La.	10/3/1925	Confirmed 12/21/1925	6 wks.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
48.	Burns, Owen M.	W.D. Pa.	10/21/1949	Confirmed 3/8/1950	11 wks.
49.	Busteed, Richard	D. Ala.	11/17/1863	Confirmed 1/20/1864	2 yrs., 10 mos.
50.	Byrne, William M.	S.D. Cal.	9/27/1950	Confirmed 12/13/1950	1 yr.
51.	Caffrey, Andrew A.	D. Mass.	10/30/1960	Confirmed 8/9/1961	5 mos.
52.	Call, Rhydon M.	S.D. Fla.	3/26/1913	Confirmed 4/24/1913	7 mos.
53.	Campbell, Ralph E.	E.D. Okla.	11/11/1907	Confirmed 1/13/1908	5 mos.
54.	Cant, William A.	D. Minn.	5/21/1923	Confirmed 1/15/1924	None
55.	Carland, John E.	D. S.D.	8/31/1896	Confirmed 12/15/1896	3 wks.
56.	Carter, Oliver J.	N.D. Cal.	9/27/1950	Confirmed 12/13/1950	8 wks.
57.	Casey, Joseph	Ct. of Claims	5/23/1861	Confirmed 7/22/1861	Unavailable
58.	Cashin, John M.	S.D.N.Y.	8/17/1955	Confirmed 3/1/1956	17 days
59.	Cecil, Lamar R.	E.D. Tex.	8/31/1954	Confirmed 12/2/1954	6 1/2 mos.
60.	Charlton, Thomas U.P.	D. Ga.	5/15/1821	Unavail.	Unavailable

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
61.	Cheney, John M.	S.D. Fla.	8/26/1912	Recess Appt. Expd. 3/9/1913	None
62.	Chestnut, William C.	D. Md.	5/9/1931	Confirmed 1/12/1932	3 days
63.	Clark, William L.	D. N.J.	5/21/1925	Confirmed 12/17/1925	7 wks.
64.	Clarke, James M.	D. R.I.	9/15/1869	Declined Appt.	4 mos.
65.	Clary, Thomas J.	E.D. Pa.	10/21/1949	Confirmed 3/8/1950	11 wks.
66.	Clay, Joseph, Jr.	D. Ga.	9/16/1796	Confirmed 1/2/1797	Unavailable
67.	Cochran, Andrew McC.	E.D. Ky.	4/24/1901	Confirmed 12/17/1901	10 wks.
68.	Cochran, Ernest F.	E.D.S.C.	11/22/1923	Confirmed 1/21/1924	None
69.	Coleman, Frank J.	S.D.N.Y.	5/19/1927	Confirmed 12/19/1927	None
70.	Coleman, William C.	D. Md.	4/6/1927	Confirmed 12/19/1927	5 wks.
71.	Conkling, Alfred	N.D.N.Y.	8/27/1825	Confirmed 12/14/1825	8 mos.
72.	Cooper, Irving B.	S.D.N.Y.	10/5/1961	Confirmed 9/20/1962	4 1/2 mos.
73.	Cotteral, John H.	W.D. Okla.	11/11/1907	Confirmed 1/13/1908	21 wks.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
74.	Cotton, William W.	D. Ore.	6/17/1905	Declined Appt. 7/26/1905	5 wks.
75.	Creigthon, William, Jr.	D. Ohio	11/1/1828	Recess Appt. Expd. 12/13/1828	11 wks.
76.	Curran, Edward M.	D.D.C.	10/16/1946	Confirmed 2/30/1947	None
77.	Curtis, Benjamin R.	Sup. Ct.	9/22/1851	Confirmed 12/20/1851	18 days
78.	Cuyler, Jeremiah	D. Ga.	6/12/1821	Confirmed 1/10/1822	None
79.	Danaher, John A.	D.C. Cir.	10/1/1953	Confirmed 3/30/1954	2 wks.
80.	Daugherty, Frederick A.	N./E./W. D. Okla.	10/5/1961	Confirmed 2/7/1952	4 1/2 mos.
81.	Davis, David	Sup. Ct.	10/17/1862	Confirmed 12/8/1862	6 1/2 mos.
82.	Davis, David J.	N.D. Ala.	12/10/1935	Confirmed 1/22/1936	12 wks.
83.	Davis, John M.	E.D. Pa.	1/7/1964	Confirmed 3/14/1964	2 yrs., 6 mos.
84.	Day, Edward W.	D. R.I.	11/10/1953	Confirmed 2/9/1954	16 wks.
85.	Decker, Bernard M.	N.D. Ill.	12/12/1962	Confirmed 3/28/1963	6 mos., 3 wks.
86.	DeLahay, Mark W.	D. Kan.	10/6/1863	Confirmed 3/15/1864	1 mo.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
87.	Devitt, Edward J.	D. Minn.	12/10/1954	Confirmed 2/4/1955	2 mos.
88.	Dick, Robert P.	W.D.N.C.	5/29/1865	Declined Appt.	Unavailable
89.	Dietrick, Frank S.	D. Idaho	3/19/1907	Confirmed 12/17/1907	18 days
90.	Dobie, Armistead M.	CA 4	12/19/1939	Confirmed 2/1/1940	2 mos.
91.	Downey, George E.	Ct. of Claims	8/3/1915	Confirmed 1/17/1916	21 wks.
92.	Druffel, John H.	S.D. Ohio	9/22/1937	Confirmed 12/8/1937	1 mo.
93.	Dunlop, James	D.C. Cir.	10/3/1845	Confirmed 2/3/1846	5 wks.
94.	Durell, Edward H.	E.D. La.	5/20/1863	Confirmed 2/17/1864	16 wks.
95.	Edelstein, David N.	S.D.N.Y.	11/1/1951	Confirmed 4/7/1952	9 mos.
96.	Edgerton, Alonzo J.	D.S.D.	11/19/1889	Confirmed 1/16/1890	9 mos.
97.	Erskine, John	S.D. Ga.	7/10/1865	Confirmed 1/22/1866	Unavailable
98.	Ewart, Hamilton G.	W.D.N.C.	7/13/1898 4/13/1899	Recess Appt. Expd. 6/7/1900	None
99.	Ewing, Nathaniel	W.D. Pa.	9/25/1906	Confirmed 12/11/1906	None

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
100.	Fahy, Charles	D.C. Cir.	10/21/1949	Confirmed 4/4/1950	11 wks.
101.	Fee, James A.	D. Ore.	3/18/1931	Confirmed 12/22/1931	10 wks.
102.	Feikens, John	E.D. Mich.	10/13/1960	Recess Appt. Expd. 9/27/1961	7 mos.
103.	Feinberg, Wilfred	S.D.N.Y.	10/5/1961	Confirmed 3/16/1962	4 1/2 mos.
104.	Finkelnburg, Gustavus	E.D. Mo.	5/20/1905	Confirmed 12/12/1905	None
105.	Friedman, Monroe M.	N.D. Cal.	7/17/1952	Nom. Withdrawn 7/24/1953	1 yr., 4 mos.
106.	Gaillard, Theordore	CA 5	5/30/1801	Unavail.	Unavailable
107.	Gaillard, Theodore	D. La.	4/13/1813	Unavail.	Unavailable
108.	Garrett, Finis J.	W.D. Tenn.	11/22/1920	Recess Appt. cancelled 12/7/1920	15 wks.
109.	Gewin, Walter P.	CA 5	10/5/1961	Confirmed 2/5/1962	4 1/2 mos.
110.	Gilchrist, Robert B.	E./W.D. S.C.	10/30/1839	Confirmed 2/17/1840	1 wk.
111.	Giles, William F.	D. Md.	7/18/1853	Confirmed 1/11/1854	10 days
112.	Glenn, Elias	D. Md.	8/31/1824	Confirmed 1/3/1825	11 wks.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
113.	Gray, Frank, Jr.	M.D. Tenn.	11/20/1961	Confirmed 2/17/1962	6 1/2 mos.
114.	Gray, George	CA 3	3/29/1899	Confirmed 12/18/1899	5 wks.
115.	Green, Ben C.	N.D. Ohio	10/5/1961	Confirmed 6/29/1962	4 1/2 mos.
116.	Green, Edward T.	D.N.J.	10/24/1889	Confirmed 1/27/1890	8 mos.
117.	Gresham, Walter Q.	D. Ind.	9/1/1869	Confirmed 12/22/1869	1 wk.
118.	Gresham, Walter Q.	CA 7	10/28/1884	Confirmed 12/9/1884	3 1/2 mos.
119.	Griffin, Cyrus	D. Va.	11/28/1789	Confirmed 2/10/1790	9 wks.
120.	Grim, Allan K.	E.D. Pa.	10/21/1949	Confirmed 4/4/1950	11 wks.
121.	Haight, Thomas G.	CA 3	4/1/1919	Confirmed 6/24/1919	12 wks.
122.	Hall, Dominick A.	CA 5	7/1/1801	Confirmed 1/26/1802	4 1/2 mos.
123.	Hall, Willard	D. Del.	5/6/1823	Confirmed 12/9/1823	13 days
124.	Hand, Augustus N.	CA 2	5/19/1927	Confirmed 1/18/1928	1 mo.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
125.	Harper, Roy W.	E./W.D. Mo.	8/7/1947, 12/20/1947, 6/22/1948	Confirmed 1/31/1949	4 wks.
126.	Hart, George L.	D.D.C.	8/29/1958	Confirmed 9/9/1959	6 mos.
127.	Harvey, Mathew	D.N.H.	11/2/1830	Confirmed 12/16/1830	3 mos.
128.	Hastie, William H.	CA 3	10/21/1949	Confirmed 7/19/1950	11 wks.
129.	Hay, George	E.D. Va.	7/5/1825	Confirmed 3/31/1826	3 mos.
130.	Hayes, Johnson J.	M.D.N.C.	4/6/1927	Confirmed 12/17/1927	2 mos.
131.	Hays, Paul R.	CA 2	10/5/1961	Confirmed 3/16/1962	4 1/2 mos.
138.	Hays, William H.	D. Ky.	9/6/1879	Confirmed 12/10/1879	39 days
139.	Heen, Walter M.	D. Haw.	12/31/1980	Recess Appt. Expd. 12/16/1981	2 yrs
140.	Henderson, David E.	W.D.N.C.	9/1/1948	Resigned w/o Confirm. 2/13/1949	6 mos.
141.	Henley, J. Smith	E.D. Ark.	10/25/1958	Confirmed 9/2/1959	7 wks.
142.	Henning, Edward J.	S.D. Cal.	4/24/1925	Confirmed 12/15/1925	1 mo.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
143.	Herlands, William B.	S.D.N.Y.	8/12/1955	Confirmed 6/26/1956	10 mos.
144.	Higginbotham, A. L.	E.D. Pa.	1/6/1964	Confirmed 3/14/1964	2 yrs., 4 1/2 mos.
145.	Hill, Delmas C.	CA 10	10/21/1949	Confirmed 3/8/1950	11 wks.
146.	Hincks, Carroll C.	CA 2	10/3/1953	Confirmed 2/9/1954	13 wks.
147.	Hitchcock, Samuel	D. Vt.	9/3/1793	Confirmed 1/28/1794	Unavailable
148.	Holly, William H.	N.D. Ill.	11/8/1933	Confirmed 2/20/1934	4 1/2 mos.
149.	Holman, Jesse L.	D. Ind.	9/16/1835	Confirmed 3/29/1836	9 1/2 wks.
150.	Hooper, Frank A.	N.D. Ga.	10/21/1949	Confirmed 2/21/1950	11 wks.
151.	Hopkins, George W.	D.C. Cir.	10/5/1855	Rec. Appt. Expd. 8/30/1856	Unavailable
152.	Hopkinson, Joseph	E.D. Pa.	10/23/1828	Confirmed 2/23/1829	Unavailable
153.	Howard, Clinton	W.D. Wash.	8/26/1912	Rec. Appt. Expd. 3/4/1913	5 wks.
154.	Hughes, Sarah T.	N.D. Tex.	10/5/1961	Confirmed 3/16/1962	4 1/2 mos.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
155.	Hundley, Oscar R.	N.D. Ala.	4/9/1907 5/30/1908 3/6/1909	Rec. Appt. Expd. 5/24/1909	6 wks.
156.	Hunter, Edwin F.	W.D. La.	10/3/1953	Confirmed 2/9/1954	28 wks.
157.	Igoe, Michael L.	N.D. Ill.	11/21/1938	Confirmed 2/9/1939	25 wks.
158.	Inch, Robert A.	E.D.N.Y.	4/23/1923	Confirmed 1/8/1924	4 mos.
159.	Irwin, Thomas	W.D. Pa.	4/14/1831	Confirmed 3/21/1832	Unavailable
160.	Johnson, Albert W.	M.D. Pa.	5/21/1925	Confirmed 12/17/1925	7 1/2 wks.
161.	Johnson, Alexander S.	CA 2	10/25/1875	Confirmed 12/15/1875	6 1/2 wks.
162.	Johnson, George E.Q.	N.D. Ill.	8/3/1932	Rejected; Rec. Appt. Expd. 3/4/1933	1 yr., 5 1/2 mos.
163.	Johnson, Joseph T.	W.D.S.C.	3/9/1915	Confirmed 1/24/1916	6 days
164.	Johnson, Tillman	D. Utah	11/2/1915	Confirmed 1/18/1916	27 wks.
165.	Johnson, Thomas	Sup. Ct.	8/5/1791	Confirmed 11/7/1791	5 mos.
166.	Jones, Thomas G.	N./M.D. Ala.	10/7/1901	Confirmed 12/17/1901	1 wk.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
167.	Jones, William G.	N./M.D. Ala.	9/29/1859	Confirmed 1/30/1860	2 mos.
168.	Kaufman, Samuel H.	S.D.N.Y.	6/22/1948	Confirmed 1/31/1949	3 mos.
169.	Kaufman, Irving R.	S.D.N.Y.	10/21/1949	Confirmed 4/4/1950	11 wks.
170.	Kerr, Ewing T.	D. Wyoming	10/22/1955	Confirmed 3/1/1956	None
171.	Keech, Richmond B.	D.D.C.	10/14/1946	Confirmed 1/22/1947	None
172.	Keller, Benjamin F.	S.D. W.Va.	6/18/1901	Confirmed 12/17/1901	5 mos.
173.	Kerner, Oho	CA 7	11/21/1938	Confirmed 2/1/1939	25 wks.
174.	Kilty, William	D.C. Cir.	3/23/1801	Confirmed 1/26/1802	None
175.	Kincheloe, David H.	Customs Ct.	9/22/1930	Confirmed 1/29/1931	None
176.	Kirkland, James R.	D. D.C.	10/21/1949	Confirmed 3/8/1950	11 wks.
177.	Kirkpatrick, Andrew	D.N.J.	11/20/1896	Confirmed 12/15/1896	6 wks.
178.	Knight, John	W.D.N.Y.	3/18/1931	Confirmed 1/6/1932	13 days
179.	Knowles, John P.	D.R.I.	10/9/1869	Confirmed 1/24/1870	1 mo.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
180.	Kraft, Charles W.	E.D. Pa.	8/12/1955	Confirmed 3/28/1956	6 mos.
181.	Lacombe, Emile H.	CA 2	5/26/1887	Confirmed 3/28/1888	12 wks.
182.	Lanning, William M.	D.N.J.	6/1/1904	Confirmed 12/13/1904	1 mo.
183.	Lawrence, William	S.D. Fla.	9/9/1863	Declined Appt.	Unavailable
184.	Letts, Fred. D.	D.D.C.	5/5/1931	Confirmed 2/17/1932	1 day
185.	Letts, Ira L.	D.R.I.	6/9/1927	Confirmed 1/4/1928	None
186.	Levitt, Albert	D.V.I.	9/20/1935	Resigned w/o Confirm. 7/31/1936	Unavailable
187.	Lewis, William	D. Pa.	7/14/1791	Confirmed 11/7/1791	9 wks.
188.	Lieb, Joseph P.	M.D. Fla.	8/13/1955	Confirmed 3/1/1956	6 wks.
189.	Livingston, Henry B.	D.N.Y.	5/16/1805	Rec. Appt. Expd. 4/21/1806	Unavailable
190.	Livingston, Henry B.	Sup. Ct.	11/10/1806	Confirmed 1/16/1807	2 mos.
191.	Love, James M.	S.D. Iowa	10/5/1855	Confirmed 2/21/1856	1 mo.
192.	Luse, Claude Z.	W.D. Wisc.	4/1/1921	Confirmed 4/27/1921	5 1/2 mos.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
193.	McCamant, Wallace	CA 9	5/25/1925	Resigned after nom. rejected by Senate 5/2/1926	None
194.	McCarthy, James W.	D.N.J.	10/6/1928	Resigned w/o Confirm. 1/31/1929	27 wks.
195.	McClelland, Charles P.	Customs Ct.	8/21/1903	Confirmed 12/8/1903	Unavailable
196.	McComas, Louis E.	D.C. Cir.	6/26/1905	Confirmed 12/6/1905	None
197.	McDowell, Henry C.	W.D. Va.	11/12/1901	Confirmed 12/18/1901	11 days
198.	McGohey, John F.X.	S.D.N.Y.	10/21/1949	Confirmed 3/8/1950	11 wks.
199.	McHugh, William D.	D. Neb.	11/20/1896	Nom. Withdrawn 12/26/1896	3 wks.
200.	McKinley, John	Sup. Ct.	4/22/1837	Confirmed 9/25/1837	7 wks.
201.	McKinney, John M.	S.D. Fla.	11/8/1870	Confirmed 2/18/1871	Unavailable
202.	McLaughlin, Charles F.	D. D.C.	10/21/1949	Confirmed 2/28/1950	11 wks.
203.	McVicar, Nelson	W.D. Pa.	9/14/1928	Confirmed 12/17/1928	29 wks.
204.	Major, James E.	D. Ill.	6/12/1933	Confirmed 1/23/1934	None

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
205.	Marshall, Thurgood	CA 2	10/5/1961	Confirmed 9/11/1962	4 1/2 mos.
206.	Martin, James L.	D. Vt.	10/20/1906	Confirmed 12/11/1906	23 days
207.	Matthews, Burnita S.	D.D.C.	10/21/1949	Confirmed 4/4/1950	11 wks.
208.	Meek, Edward R.	N.D. Tex.	7/13/1898	Confirmed 2/15/1899	5 mos.
209.	Merrick, William M.	D. D.C.	5/1/1885	Confirmed 3/30/1886	1 day
210.	Mickelson, George T.	D. S.D.	12/9/1953	Confirmed 2/9/1954	None
211.	Moinet, Edward J.	E.D. Mich.	6/13/1927	Confirmed 12/19/1927	14 1/2 wks.
212.	Moore, Leonard P.	CA 2	9/6/1957	Confirmed 2/25/1958	8 mos.
213.	Morris, Martin F.	D.C. Cir.	4/15/1893	Unavail.	9 wks.
214.	Morris, Robert	D.N.J.	8/28/1790	Confirmed 12/20/1790	12 days
215.	Morrow, William W.	N.D. Cal.	9/18/1891	Confirmed 1/11/1892	5 1/2 wks.
216.	Nealon, William J.	M.D. Pa.	12/13/1962	Confirmed 3/15/1963	8 1/2 mos.
217.	Neese, C. G.	E.D. Tenn.	11/20/1961	Confirmed 2/7/1962	6 mos.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
218.	Newman, William T.	N.D. Ga.	8/13/1886	Confirmed 1/13/1887	2 wks.
219.	Nicoll, John C.	N./S.D. Ga.	5/11/1839	Confirmed 2/17/1840	4 days
220.	Niles, Henry C.	N./S.D. Miss.	8/11/1891	Confirmed 1/11/1892	10 days
221.	Noel, James L.	S.D. Tex.	10/5/1961	Confirmed 3/16/1962	4 1/2 mos.
222.	Noonan, Gregory F.X.	S.D.N.Y.	10/21/1949	Confirmed 4/25/1950	9 1/2 mos.
223.	Nordbye, Gunnar H.	D. Minn.	3/18/1931	Confirmed 2/3/1932	9 1/2 mos.
224.	Northcott, Elliott	CA 4	4/6/1927	Confirmed 12/15/1927	11 days
225.	Noyes, Walter C.	CA 2	9/18/1907	Confirmed 12/10/1907	15 1/2 wks.
226.	O'Donoghue, Daniel W.	D.D.C.	10/28/1931	Confirmed 1/26/1932	9 1/2 mos.
227.	Otis, Merrill, E.	W.D. Mo.	2/23/1925	Confirmed 12/14/1925	None
228.	Paca, William	D. Md.	12/22/1789	Confirmed 2/10/1790	Unavailable
229.	Palmer, Alexander M.	Court of Claims	3/16/1915	Declined Appt.; Resigned 7/22/1915	8 days
230.	Parker, John J.	CA 4	10/3/1925	Confirmed 12/14/1925	15 wks.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
231.	Peck, John W.	S.D. Ohio	10/5/1961	Confirmed 4/11/1962	4 1/2 mos.
232.	Pennington, William S.	D.N.J.	6/19/1815	Confirmed 1/16/1816	7 wks.
233.	Pitman, John	D.R.I.	8/4/1824	Confirmed 1/3/1825	Unavailable
234.	Potter, Henry	C.A. 5	5/9/1801	Confirmed 1/26/1802	12 wks.
235.	Preyer, Lunsford R.	M.D.N.C.	10/7/1961	Confirmed 2/7/1962	4 1/2 mos.
236.	Purdy, Milton D.	D. Minn.	7/6/1908 3/6/1909	Resigned w/o Confirm. 5/1/1909	None
237.	Rabinovitz, David	W.D. Wisc.	1/7/1964	Rec. Appt. Expd. 10/4/1964	1 yr.
238.	Randolph, Peter	D. Miss.	6/25/1823	Confirmed 12/9/1823	Unavailable
239.	Rao, Paul P.	Customs Ct.	6/22/1948	Confirmed 1/31/1949	7 1/2 wks.
240.	Ray, George W.	N.D.N.Y.	9/12/1902	Confirmed 12/8/1902	3 1/2 mos.
241.	Raymond, Fred M.	W.D. Mich.	5/8/1925	Confirmed 12/18/1925	13 wks.
242.	Ricks, Augustus J.	N.D. Ohio	7/1/1889	Confirmed 1/16/1890	1 mo.
243.	Ringo, Daniel	E./W.D. Ark.	11/5/1849	Confirmed 6/10/1850	Unavailable

	NAME	COURT	RECESS APPT.	ACION	DURATION OF VACANCY
244.	Ritter, Willis W.	D. Utah	10/21/1949	Confirmed 6/29/1950	21 wks.
245.	Robb, Charles H.	D.D.C.	10/5/1906	Confirmed 12/11/1906	5 days
246.	Roberts, Clarence J.	D.N.M.	9/15/1910	Confirmed 12/19/1910	None
247.	Roberts, Floyd H.	W.D. Va.	7/6/1938	Rejected; Resigned 2/6/1939	5 wks.
248.	Robinson, Spottswood W.	D.D.C.	1/6/1964	Confirmed 7/1/1964	3 yrs., 7 1/2 wks
249.	Robson, Edwin A.	N.D. Ill.	9/29/1958	Confirmed 4/29/1959	5 1/2 wks.
250.	Rogers, John H.	W.D. Ark.	11/27/1896	Confirmed 12/15/1896	10 days
251.	Rosenberg, Louis	W.D. Pa.	11/20/1961	Confirmed 7/10/1962	6 mos.
252.	Rosling, George	E.D.N.Y.	10/5/1961	Confirmed 3/16/1962	4 1/2 mos.
253.	Rossell, William	D.N.J.	11/10/1826	Confirmed 12/19/1826	6 1/2 wks.
254.	Rutledge, John	Sup. Ct.	7/1/1795	Rejected 12/15/1795	2 days
255.	Ryan, Sylvester J.	S.D.N.Y.	11/1/1947	Confirmed 12/18/1947	1 day

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
256.	Sage, George R.	S.D. Ohio	3/20/1883	Confirmed 1/7/1884	8 days
257.	Sater, John E.	S.D. Ohio	3/18/1907 5/30/1908	Confirmed 3/1/1909	3 wks.
258.	Scarburgh, George P.	Ct. of Claims	5/8/1855	Rec. Appt. Expd. 8/18/1856	Unavailable
259.	Schnackenberg, Elmer J.	CA 7	11/17/1953	Confirmed 2/9/1954	11 mos.
260.	Sheppard, William B.	N.D. Fla.	9/4/1907	Confirmed 5/20/1908	2 mos.
261.	Shipman, Nathaniel	D. Conn.	4/16/1873	Confirmed 12/8/1873	2 days
262.	Simonton, Charles H.	E./W.D. S.C.	9/3/1886	Confirmed 1/13/1887	None
263.	Skinner, Roger	N.D.N.Y.	11/24/1819	Confirmed 1/5/1820	Unavailable
264.	Smith, Talbot	E.D. Mich.	10/5/1961	Confirmed 2/5/1962	4 1/2 mos.
265.	Solomon, Gus J.	D. Ore.	10/21/1949	Confirmed 6/27/1950	11 wks.
266.	Soper, Morris A.	CA 4	5/6/1931	Confirmed 1/12/1932	1 mo.
267.	Spears, Adrian A.	W.D. Tex.	10/5/1961	Confirmed 3/16/1962	4 1/2 mos.
268.	Stanley, Edwin M.	M.D.N.C.	10/23/1957	Confirmed 2/25/1958	18 wks.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
269.	Stephens, William	D. Ga.	10/22/1801	Confirmed 1/26/1802	Unavailable
270.	Sugarman, Sidney	S.D.N.Y.	10/15/1949	Confirmed 4/28/1950	2 1/2 mos.
271.	Sullivan, Philip L.	N.D. Ill.	11/8/1933	Confirmed 2/2/1934	1 yr., 9 mos.
272.	Swaim, Hardress N.	CA 7	10/21/1949	Confirmed 2/8/1950	11 wks.
273.	Swayne, Charles	N.D. Fla.	5/17/1889	Confirmed 4/1/1890	28 wks.
274.	Switzer, Carroll O.	S.D. Iowa	10/21/1949	Rejected; Resigned 12/26/1950	7 1/2 mos.
275.	Tallmadge, Matthias B.	N.D.N.Y.	6/12/1805	Confirmed 1/17/1806	4 1/2 mos.
276.	Tamm, Edward A.	D.D.C.	6/22/1948	Confirmed 3/29/1949	7 wks.
277.	Tappan, Benjamin	D. Ohio	10/12/1833	Rejected 12/26/1833	18 days
278.	Tavares, Cyrus N.	D. Haw.	10/13/1960	Confirmed 9/21/1961	7 1/2 wks.
279.	Taylor, Robert L.	E.D. Tenn.	11/2/1949	Confirmed 3/8/1950	None
280.	Thomas, Seth	CA 8	12/2/1935	Confirmed 1/22/1936	2 days
281.	Thompson, Albert C.	S.D. Ohio	9/23/1898	Confirmed 12/20/1898	1 day

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
282.	Thompson, Smith	Sup. Ct.	9/1/1823	Confirmed 12/9/1823	5 1/2 mos.
283.	Tilson, William J.	M.D. Ga.	7/6/1926 3/5/1927	Resigned w/o Confirm. 3/19/1928	5 1/2 wks.
284.	Tolin, Ernest A.	S.D. Cal.	10/30/1951	Confirmed 6/10/1952	2 mos.
285.	Trieber, Jacob	E.D. Ark.	7/26/1900	Confirmed 1/9/1901	19 days
286.	Turner, Ezekiel B.	W.D. Tex.	11/18/1880	Confirmed 12/20/1880	Unavailable
287.	Underwood, John C.	E.D. Va.	3/27/1863	Confirmed 11/25/1864	1 yr., 11 mos.
288.	Van Fleet, William C.	N.D. Cal.	3/4/1907 4/2/1907	Confirmed 12/17/1907	2 days
289.	Van Orsdel, Josiah A.	D.C. Cir.	11/14/1907	Confirmed 12/12/1907	4 days
290.	Vaught, Edgar S.	W.D. Okla.	5/31/1928	Confirmed 1/8/1929	8 days
291.	Walker, Thomas G.	D.N.J.	12/20/1939	Confirmed 3/5/1940	1 yr., 6 mos.
292.	Ward, Henry G.	CA 2	5/18/1907	Confirmed 12/17/1907	10 days
293.	Warren Earl,	Sup. Ct.	10/2/1953	Confirmed 3/1/1954	24 days
294.	Washington, Bushrod	Sup. Ct.	9/29/1798	Confirmed 12/20/1798	5 1/2 wks.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
295.	Washington, George T.	D.C. Cir.	10/21/1949	Confirmed 4/28/1950	11 wks.
296.	Watkins, Robert D.	D. Md.	8/12/1955	Confirmed 3/1/1956	10 wks.
297.	Webster, John S.	E.D. Wash.	4/28/1923	Confirmed 1/6/1924	15 1/2 wks.
298.	Weldon, Lawrence	Ct. of Claims	11/24/1883	Confirmed 12/18/1883	19 days
299.	Welker, Martin	N.D. Ohio	11/25/1873	Confirmed 12/8/1873	None
300.	Wilson, James C.	N.D. Tex.	3/5/19/9	Confirmed 6/24/1919	1 wk.
301.	Winch, Joel C.C.	E.D. Tex.	10/11/1870	Rec. Appt. Expd. 3/4/1871	1 yr., 9 mos.
302.	Winchester, James	D. Md.	10/31/1799	Confirmed 12/10/1799	8 days
303.	Winter, Harrison L.	D. Md.	11/9/1961	Confirmed 2/7/1962	5 1/2 mos.
304.	Wolverton, Charles E.	D. Ore.	11/20/1905	Confirmed 1/15/1906	27 1/2 wks.
305.	Woodburn, William	D. Nev.	9/23/1933	Declined Appt.	None
306.	Woodbury, Levi	Sup. Ct.	9/20/1845	Confirmed 1/3/1846	10 days
307.	Woods, William A.	D. Ind.	5/2/1883	Confirmed 1/7/1884	1 mo.

	NAME	COURT	RECESS APPT.	ACTION	DURATION OF VACANCY
308.	Woolson, John S.	S.D. Iowa	8/14/1891	Confirmed 1/11/1892	6 wks.
309.	Wright, James S.	E.D. La.	10/21/1949	Confirmed 3/8/1950	None