No. 04-38

In the Supreme Court of the United States

SHANNON MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
CHRISTOPHER A. WRAY
Assistant Attorney General
JEFFREY P. SINGDAHLSEN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Recess Appointments Clause, U.S. Const. Art. II, § 2, Cl. 3, permits the President to appoint judges to Article III courts.

2. Whether the Recess Appointments Clause authorizes the President to fill vacancies during recesses that occur during a session of Congress, or only permits appointments during recesses occurring between sessions of Congress.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter*, but it is available at 2004 WL 1206955 and the judgment is noted at 104 Fed. Appx. 150 (Table). The order of the district court (Pet. App. 10a-15a) is unreported. The report and recommendation of the magistrate judge (Pet. App. 16a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2004. The petition for a writ of certiorari was filed on June 24, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841. Pet. App. 16a. Petitioner was sentenced to 210 months of imprisonment, to be followed by five years of supervised release. *Id.* at 17a. The court of appeals affirmed. *Ibid.* On October 3, 2002, petitioner filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. Pet. App. 1a, 10a. The district court denied the motion. *Id.* at 10a-15a, 16a-33a. The court of appeals affirmed. *Id.* at 1a-5a.

1. On March 8, 1994, petitioner was traveling on a Greyhound bus in Florida. At a stop, police officers performing drug interdiction inspections asked to search petitioner's luggage and informed him that he was free to decline their request. 94-5013 Gov't C.A. Br. 4-6. Petitioner consented to the search of his bag. Inside, the officers found five baggies containing almost 600 grams of crack cocaine. After arresting petitioner, the officers found five bags of marijuana in petitioner's shirt pocket. *Id.* at 6-8.

2. On March 29, 1994, a federal grand jury in the Southern District of Florida indicted petitioner on one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841. Pet. App. 16a. After a trial, petitioner was convicted and sentenced. *Id.* at 17a. On July 24, 1996, the court of appeals affirmed petitioner's conviction and sentence. *Ibid.*

3. On October 3, 2002, more than six years after the court of appeals affirmed his conviction, petitioner filed a motion to correct his sentence under 28 U.S.C. 2255 raising three claims. Pet. App. 16a, 18a. First, peti-

tioner argued that he was denied the effective assistance of counsel because his attorney had allegedly failed to tell him that the prosecutor had said that the government would not recommend a reduction in sentence based on future cooperation efforts unless petitioner pleaded guilty. *Id.* at 17a-18a. Second, petitioner claimed that the government violated the Due Process Clause by not moving to reduce his sentence under Federal Rule of Criminal Procedure 35 because of purported post-conviction assistance to the government. *Id.* at 18a-19a. Third, petitioner claimed that he was denied the effective assistance of counsel because neither the government nor his attorney had informed the sentencing court that the government allegedly had foreclosed giving petitioner credit for future cooperation. *Id.* at 13a, 19a.

4. The district court, adopting the magistrate judge's report and recommendation, Pet. App. 16a-33a, denied the motion. *Id.* at 10a-15a. Both the magistrate judge and the district court questioned whether petitioner had filed his motion within one year of when he could have, with due diligence, discovered the facts underlying his claims, as required by Section 2255. See *id.* at 11a, 25a. The court declined to resolve the statute of limitations issue, however, because it concluded that petitioner's claims lacked merit. *Id.* at 11a. The court first concluded that petitioner could not establish prejudice from his attorney's claimed failure to report the government's alleged refusal to credit his cooperation, because the record indicated that petitioner had expressed no interest in plea negotiations and had stated that he wished to go to trial to preserve his challenge to the search of his luggage. *Id.* at 12a, 27a-29a. The district court also found petitioner's due process claim to be without merit, noting that the government had

discretion whether to file a Rule 35 motion, *id.* at 12a-13a, and that petitioner had not claimed that the government had made or breached any promise regarding his cooperation. *Id.* at 13a, 30a. Finally, the district court held that neither petitioner's counsel nor the government had any duty to inform the sentencing court of the government's purported refusal to provide sentencing credit for future cooperation, *id.* at 13a-14a, 31a-32a, and that no misrepresentations had been made about the likelihood of a future Rule 35 filing. *Id.* at 13-14a, 32a.

5. The court of appeals granted petitioner's motion for a certificate of appealability on two limited issues (whether petitioner was entitled to an evidentiary hearing about whether his lawyer had failed to disclose the prosecutor's alleged statement, and whether counsel had adequately advised petitioner and the sentencing court of the government's alleged refusal to recommend a reduction in sentence based on petitioner's future cooperation unless he pleaded guilty). Pet. App. 8a.

After briefing, the case was assigned to a panel composed of Circuit Judges Joel F. Dubina, Stanley Marcus, and William H. Pryor Jr. On April 28, 2004, the court affirmed in an unpublished per curiam opinion. The court held that petitioner was not entitled to an evidentiary hearing because, even assuming the facts alleged, he could not demonstrate prejudice. Pet. App. 4a. The court also held that petitioner had failed to show that there was any obligation to inform the sentencing court of the government's purported statement or that, had the court been so informed, there was any legal basis on which the court could have reduced petitioner's sentence. *Id.* at 4a-5a. Petitioner failed to

make any motion to either the panel or the en banc court challenging the composition of the panel.

6. On April 9, 2003, the President nominated William H. Pryor Jr. to fill a vacancy on the United States Court of Appeals for the Eleventh Circuit. 149 Cong. Rec. S5101 (daily ed. Apr. 9, 2003). On July 23, 2003, the Senate Judiciary Committee favorably reported his nomination to the full Senate. See *Judiciary Committee Report on Nominees* 14 (last modified Sept. 20, 2004) <http://judiciary.senate.gov/noms/108/committee_report.pdf>. On February 20, 2004, while the Senate was in recess, see H.R. Con. Res. 361, 108th Cong., 2d Sess. (2004); see also 150 Cong. Rec. S1414 (daily ed. Feb. 12, 2004) (statement of Sen. Frist), the President appointed Judge Pryor to the court of appeals pursuant to the Recess Appointments Clause of the Constitution, Art. II, § 2, Cl. 3. Statement on Appointment of William H. Pryor Jr. (Feb. 20, 2004) <http://www.whitehouse.gov/news/releases/2004/02/print/20040220-6.html>. Judge Pryor was sworn in the same day.

ARGUMENT

Petitioner contends, for the first time in any court, that the presence of Judge Pryor on the panel that decided his appeal created a "'plain defect in the composition of the panel' * * * , which can be corrected only by 'fresh consideration of [the] appeal[] by a properly constituted [appellate] panel.'" Pet. 17 (quoting *Nguyen* v. *United States*, 539 U.S. 69, 81, 83 (2003)). He contends that Judge Pryor's appointment was in violation of both Article III of the Constitution and the Recess Appointments Clause, which authorizes the President to "fill up all Vacancies" during a "Recess of the Senate." U.S. Const. Art. II, § 2, Cl. 3. Petitioner claims (Pet. 8-12; see also Kennedy Amicus Br. 5-14)

that the Recess Appointments Clause permits the President to make appointments only during recesses between sessions of Congress ("inter-session recesses"), and does not permit the making of appointments during recesses within a session of Congress ("intra-session recesses"). Petitioner also claims (Pet. 13-18; see also Kennedy Amicus Br. 14-20) that the President may not use the recess appointment power to appoint judges to Article III courts. The President's power to appoint Article III judges during recesses of the Senate (including intra-session recesses) is supported by the text, history, and purpose of the Recess Appointments Clause and centuries of unbroken practice. The issues have not divided the lower courts, see Pet. 7; Kennedy Amicus Br. 17, and further review is not warranted.

1. Review should be denied because the constitutionality of intra-session judicial recess appointments was not raised or passed upon below. "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); accord *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). The fact that petitioner states (Pet. 5) that he did not learn that Judge Pryor would be on the panel until after his case was decided may explain his failure to raise the claim before the court's decision below. Petitioner could, however, have raised the issue in seeking panel rehearing or rehearing en banc once Judge Pryor's participation came to light. In any event, even if petitioner had done all he could to preserve the claim, review nevertheless should be denied because the "pressed or passed upon below" rule serves to improve the quality of decisionmaking by ensuring that this Court "ha[s] the benefit of a decision

analyzing the application of [constitutional principles] to the facts of petitioner's case." *Wills* v. *Texas*, 511 U.S. 1097, 1098 (1994) (O'Connor, J., concurring in denial of certiorari).

Petitioner contends (Pet. 16) that this Court need not wait for a lower-court decision addressing the constitutionality of intra-session judicial recess appointments because the subject has been discussed "in Attorney General opinions, academic articles, and reports by the Congressional Research Service." *Ibid.*; see also Kennedy Amicus Br. 4. Petitioner further contends (Pet. 16; see also Kennedy Amicus Br. 3-5) that "the benefits of waiting for a lower court decision are far outweighed by the costs," because the number of potentially affected cases will increase as Judge Pryor continues to hear cases. Those facts do not justify review in this case. While the CRS reports collect valuable historical information (such as the number and identity of recess appointees), they do not purport to undertake an exhaustive analysis of the legal issues. And consideration by scholars is not a substitute for resolution of concrete controversies by courts.

As for the number of cases affected, review at this time would be particularly inappropriate because the Eleventh Circuit is soon expected to address the questions raised by the petition. In *Evans* v. *City of Zebulon*, 351 F.3d 485 (11th Cir. 2003), reh'g en banc granted, 364 F.3d 1298 (11th Cir. 2004), which raises Fourth Amendment and qualified immunity issues, a party has challenged the constitutionality of Judge Pryor's appointment to the Eleventh Circuit and his service on the en banc court that will hear reargument in that case. The case is scheduled for argument en banc on October 26, 2004. The United States has intervened in the litigation for the purpose of defending

the constitutionality of Judge Pryor's appointment, and Senator Kennedy has filed an amicus brief (and a reply brief) arguing that Judge Pryor's recess appointment was invalid. Briefing is now complete. The Eleventh Circuit has indicated that it does not intend to have oral argument on the validity of Judge Pryor's appointment, see *Stephens* v. *Evans*, No. 02-16424, order at 2 (July 19, 2004) ("For now at least, expect no oral argument on this issue."), suggesting that the court of appeals might decide the issue in advance of the October 26 en banc argument on the Fourth Amendment and qualified immunity issues. Particularly in light of that possibility, review by this Court in advance of consideration of the issue by the court of appeals is unwarranted.

Review is not now warranted for two other reasons. First, the issue has not divided the lower courts. See generally Sup. Ct. R. 10. As petitioner and amicus concede (Pet. 7; Kennedy Amicus Br. 17), the courts that have considered the constitutionality of judicial recess appointments uniformly have upheld the practice, see *United States* v. *Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc), cert. denied, 475 U.S. 1048 (1986); *United States* v. *Allocco*, 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963), and no court of appeals has addressed the constitutionality of intra-session recess appointments. Second, contrary to the claim of amicus (Br. 3) that the Executive Branch has made "ever-expanding" and "*regular*" use of the recess appointment power to make judicial appointments, only four judges have been the subject of recess appointments in the last forty years. See App. 26a, *infra*. That is an extremely modest number by historical standards. For example, Presidents Washington, John Adams, Jefferson, Madison, and Monroe together made 28 known recess ap-

pointments to Article III courts, see *id.* at 23a-25a, *infra*, and Presidents Truman, Eisenhower, and Kennedy together made 89. See *id.* at 3a-9a.

2. The Appointments Clause of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." U.S. Const. Art. II, § 2, Cl. 2. The Recess Appointments Clause immediately follows and confers on the President the "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." *Id.* Art. II, § 2, Cl. 3. Although there was little discussion of the Recess Appointments Clause at the Constitutional Convention, Alexander Hamilton described it in *The Federalist* as providing a "supplement" to the President's appointment power, establishing an "auxiliary method of appointment, in cases to which the general method was inadequate." *The Federalist No. 67*, at 409 (Clinton Rossiter ed., 1961). He further explained that the Clause was needed because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers," and it "might be necessary for the public service to fill [vacancies] without delay." *Id.* at 410. Justice Story confirmed that the Clause was intended to achieve "convenience, promptitude of action, and general security," and to avoid the need "that the senate should be perpetually in session." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 804, at 574 (Ronald D. Rotunda & John E. Nowark eds., 1987).

In permitting the President to "fill up all Vacancies" during "the Recess" of the Senate, the Recess Appoint-

ments Clause by its terms encompasses all vacancies and all recesses (with the single arguable exception, discussed below, of *de minimis* breaks of three days or less, see U.S. Const. Art. I, § 5, Cl. 4). Petitioner and amicus Senator Kennedy propose to restrict the Clause to only some recesses (inter-session as opposed to intra-session recesses) and to only some vacancies (of executive as opposed to judicial offices). Those restrictions are unfounded.

a. Petitioner cites nothing in the text of the Constitution to support his claim that the Recess Appointments Clause does not apply to Article III judges (Pet. 13-16; see also Kennedy Amicus Br. 14-19), but instead relies on a general assertion that there is "an inherent inconsistency between Article III and the Recess Appointments Clause," Pet. 15, because judges serving recess appointments lack life tenure. That claim is without merit.

i. The Recess Appointments Clause follows immediately after the Appointments Clause within the same section of Article II and concerns closely related subject matter. The provisions thus are most naturally construed *in pari materia*, so that the Recess Appointments Clause's reference to "all Vacancies" encompasses any vacancy in any office covered by the immediately preceding Appointments Clause (which includes judges of the United States Courts of Appeals).

ii. The Framers' understanding of the Recess Appointments Clause confirms that construction. Hamilton explained that the Clause is "supplementary to" the Appointments Clause, and that "the *vacancies* of which it speaks must be construed to relate to the 'officers' described in the preceding [clause]." *The Federalist No. 67*, *supra*, at 410. Thus, it has long been understood that "the mode of appointing judges * * * is the same

with that of appointing the officers of the Union in general." *The Federalist No. 78*, *supra*, at 464 (Alexander Hamilton). Moreover, Edmund Randolph, a member of the Constitutional Convention, initially opposed ratification in part because the Constitution empowers the President to make judicial recess appointments. See 3 *The Records of the Federal Convention of 1787*, at 123, 127 (Max Farrand ed., 1937); *Woodley*, 751 F.2d at 1010; cf. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351 (1816) (construction of Constitution was supported by view "publicly avowed by its friends, and admitted by its enemies" during ratification).[1]

The application of the Recess Appointments Clause to judicial vacancies is also confirmed by longstanding practice. *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 412 (1926) (practice at the time "the founders of our government and framers of our Constitution were actively participating in public affairs," which has been "long acquiesced in[,] fixes the construction to be given [the Constitution's] provisions"). Beginning just months after the Constitution became effective, Pres-

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[1] In a footnote, amicus suggests (Br. 5 n.2) that the Recess Appointments Clause can be read to apply only to vacancies that happen to arise during recesses rather than those that happen to exist during recesses. That interpretation has been rejected by both courts of appeals to have addressed the question, see *Woodley*, 751 F.2d at 1012-1013; *Allocco*, 305 F.2d at 709-714, as well as by a "long and unanimous line of opinions of the Attorneys General," 41 Op. Att'y Gen. 463, 465 (1960) (collecting authorities), beginning during the Monroe Administration, see 1 Op. Att'y Gen. 631, 631-633 (1823). See generally Henry B. Hogue, *Recess Appointments: Frequently Asked Questions* 2 (Sept. 10, 2002) (Cong. Research Serv. Report) <http://www.senate.gov/reference/resources/pdf/RS21308.pdf> ("Attorneys General and courts have now long supported" the interpretation that the Clause applies to any vacancies that exist during a recess).

ident Washington made nine known recess appointments to Article III courts, including the recess appointment of Thomas Johnson to the Supreme Court in 1791 and of John Rutledge to be the second Chief Justice in 1795. App. 24a-25a, *infra*. Washington had served as President of the Constitutional Convention, and his Cabinet included Alexander Hamilton and John Jay, both contributors to *The Federalist Papers*, as well as Edmund Randolph. As Secretary of State, Jay would have made out and recorded the commissions, see Act of Sept. 15, 1789, ch.14, § 4, 1 Stat. 68, and Randolph was specifically advised of the appointments, see 30 *The Writings of George Washington from the Original Manuscript Sources, 1745-1799*, at 472-473 (John C. Fitzpatrick ed., 1939). There is no indication that any member of Washington's Cabinet questioned the constitutionality of these appointments.

Judicial recess appointments continued in the ensuing Administrations of Presidents John Adams, Jefferson, Madison, and Monroe, who together made at least 19 judicial recess appointments, including three appointments to the Supreme Court. See App. 23a-24a, *infra*. Judicial recess appointments have continued ever since. With the exception of Presidents William Henry Harrison and John Tyler (who together served a single term), every President until President Nixon made at least one judicial recess appointment. See *id.* at 26a-27a. President Truman alone made 37 such appointments; President Eisenhower made 27; and Presidents Kennedy and Theodore Roosevelt each made 25. In all, at least 37 Presidents have made 292 known judicial recess appointments. See *id.* at 26a-27a. At least 12 Supreme Court Justices have received recess appointments, including Chief Justices Warren and Rutledge, and Justices Brennan and Stewart. See *id.* at

1a; Henry B. Hogue, *The Law: Recess Appointments of Article III Judges*, 34 Presidential Stud. Q. 656, 660-661 (2004).[2] Other prominent judges to have received recess appointments include David Bazelon, Griffin Bell, Augustus Hand, Leon Higginbotham, Thurgood Marshall (to the Second Circuit), and Spottswood Robinson. See App. 3a, 4a, 7a, 11a, *infra*.

iii. The Senate has acquiesced in and affirmatively approved the practice of judicial recess appointments. Despite the number and visibility of the recess appointments made by the nation's first five presidents, no objections appear to have been raised to the practice. For example, in February 1790, Washington nominated for lifetime appointments a group of candidates that included his first judicial recess appointees, and he specifically informed the Senate which nominees had already received recess appointments. The next day, the Senate confirmed them all without objection. 1 Senate Executive Journal, 1st Cong., 2d Sess. 38, 40 (1790). Of the 28 known recess appointments made during the administrations of Presidents Washington, John Adams, Jefferson, Madison, and Monroe, all but one of the persons appointed were confirmed as an Article III judge.[3] See App. 23a-25a, 27a, *infra*. The

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[2] Some sources indicate that Justice Alfred Moore, the first Justice Harlan, and Justice Holmes received recess appointments. See *Recess Appointments of Article III Judges*, *supra*, at 660. The author of a recent article concludes that the historical evidence indicates that Justices Moore and Harlan did not receive recess appointments, *id.* at 661-662, and that although Justice Holmes may have been offered a recess appointment, "the process was aborted before the appointment had any functional effect." *Id.* at 665.

[3] Although Henry Livingston (who was appointed to the District Court for the District of New York) was not confirmed to

sole exception was Chief Justice Rutledge, whose permanent nomination was rejected because of his outspoken opposition to the Jay Treaty, rather than because of objection to his recess appointment. See *Ex parte Ward*, 173 U.S. 452, 455 n.1 (1899) (reporter's note); see also *id.* at 456 n.1 (noting that "it appears that * * * both Houses of Congress have recognized [Rutledge] as one of the Chief Justices"). See generally Note, *Recess Appointments to the Supreme Court—Constitutional But Unwise?*, 10 Stan. L. Rev. 124, 132 (1957) ("During this period, when those who wrote the Constitution were alive and active, not one dissenting voice was raised against the practice."). By our calculation, the Senate has confirmed at least 259 of the 292 known recess appointments made to Article III courts. See App. 26a-27a, *infra*.

Congress has also enacted statutes providing for compensation of recess appointees, without purporting to exclude judicial recess appointees (or intra-session recess appointees) from eligibility for compensation. See, *e.g.*, 5 U.S.C. 5503(a).[4] Those statutes reflect

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that position, he then received a recess appointment to the Supreme Court, and was confirmed in a permanent appointment to that position. See App. 23a-24a, *infra*.

[4] Section 5503(a) provides:

> Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate. This subsection does not apply—
>
> > (1) if the vacancy arose within 30 days before the end of the session of the Senate;

Congress' implicit acknowledgment that the President has the power to make such appointments. Cf. 41 Op. Att'y Gen. 463, 466 (1960) (legislation reflected fact that Congress "implicitly assumed" that the President had the power to make recess appointments to fill vacancies that existed while Congress was in session). The Comptroller General, who is an "officer of the Legislative Branch" and therefore "subservient to Congress," *Bowsher* v. *Synar*, 478 U.S. 714, 727, 731 (1986), indicated that judges appointed during an intra-session recess of the Senate had been constitutionally appointed. See 28 Comp. Gen. 30, 34-36 (1948). Even on those occasions when the Senate has requested that the President make fewer judicial recess appointments, it has acknowledged his authority to make them. For example, Senator Hart, who sponsored such a resolution in 1960, acknowledged that "[t]he President does have such power." 106 Cong. Rec. 18,130 (1960).

iv. Since the Framing, courts and judges have also acknowledged the constitutionality of judicial recess appointments. When John Rutledge received a recess appointment to be Chief Justice in 1795, four of the six members of the Court (including Rutledge himself) had signed the Constitution. Compare U.S. Const. (list of signers), with Gerald Gunther, *Constitutional Law* App. B, at B1 (12th ed. 1991) (list of Justices). None of

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> (2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or
>
> (3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected receives a recess appointment.

them objected to the appointment. To the contrary, the "other members of the [C]ourt acted with [Rutledge] as [Chief Justice] without objection." *Ex parte Ward*, 173 U.S. at 456 n.1 (reporter's note). A fifth member of that Court, James Iredell, opined, after the resignation of Chief Justice Jay, that the President could "make a temporary appointment" of his successor under the Recess Appointments Clause. See 2 Griffith J. McRee, *Life and Correspondence of James Iredell* 447-448 (1857).

The only two courts that have considered constitutional challenges to judicial recess appointments have held such appointments to be constitutional. See *Woodley*, *supra*; *Allocco*, *supra*. Relying on the language of the Clause and the unbroken historical record, both affirmed the President's authority to make recess appointments to Article III courts. See *Woodley*, 751 F.2d at 1009-1012; *Allocco*, 305 F.2d at 708-709.

v. Petitioner contends (Pet. 15) that the Court should nevertheless grant review in this case because "there is an inherent inconsistency" between the Recess Appointments Clause and Article III, which provides that judges "shall hold their Offices during good Behaviour," U.S. Const. Art. III, § 1. Petitioner asserts that "[t]hese directly conflicting constitutional principles need to be reconciled." Pet. 15. But the Constitution is not, as petitioner and amicus (Br. 18) argue, internally inconsistent on the question of recess appointments for judges.

The Appointments Clause makes clear that "Judges" are among the "Officers" eligible to receive recess appointments. U.S. Const. Art. II, § 2, Cl. 2. The Recess Appointments Clause makes clear that the President's power extends to "*all* Vacancies" and that such recess appointees receive a fixed term of office until "the End

of" the "next Session" of the Senate. *Id.* Art. II, § 2, Cl. 3 (emphasis added). The Good Behaviour provision does not contradict those provisions. For non-recess-appointed Article III judges, life tenure is the product of the lack of a constitutionally defined term of office *combined with* the protections of the Good Behaviour provision. Cf. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839) (stating that the Good Behaviour provision implies life tenure for "offices, the tenure of which is *not* fixed by the Constitution") (emphasis added). But for judicial recess appointees, the Recess Appointments Clause defines their term of office, and the Good Behaviour provision forecloses any possible inference that the President's express power to appoint Article III judges gives rise to an implied power to remove them at will. See *Myers* v. *United States*, 272 U.S. 52 (1926). There is therefore no tension between the two clauses and certainly no basis for ignoring the unambiguous language of the Recess Appointments Clause clearly indicating that it applies to all vacancies and includes judges among the officers eligible to receive recess appointments.

b. Petitioner contends that the Recess Appointments Clause applies only to inter-session, not intra-session, recesses. Pet. 8-12; see also Kennedy Amicus Br. 5-14. Petitioner offers three arguments in support of that claim. First, he contends, the Recess Appointments Clause "refers to the singular 'Recess' * * * which could only mean the single recess that occurs between sessions of Congress (the 'inter-session recess')." Pet. 8; see also Kennedy Amicus Br. 6 ("'Recess' * * * was a term of art that referred specifically to the break between the generally uninterrupted sessions of Congress."). Second, reading the Clause to apply to intra-session recesses would result in appoint-

ments of varying length and would give an individual who is appointed during an intra-session recess more than a single session of Congress in which to be confirmed, which petitioner claims is "irrational" (Pet. 10) and "makes no sense." Pet. 9. Third, petitioner contends (Pet. 10-11) that the Constitution draws a consistent distinction between intra-session breaks, which it terms "adjournments," and inter-session breaks, which it denominates as "recess[es]." Those claims are without merit. The language of the Clause, its purpose, and historic practice refute petitioner's proposed distinction.

i. "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States* v. *Sprague*, 282 U.S. 716, 731 (1931). In its normal and ordinary usage, the term "Recess" did not denote any distinction between inter-session and intra-session recesses; it was instead a general term for the suspension of business. See, *e.g.*, 2 Samuel Johnson, *A Dictionary of the English Language* (1755) (a "[r]emission or suspension of any procedure" or "[d]eparture into privacy"); 2 Noah Webster, *An American Dictionary of the English Language* 51 (1828) ("Remission or suspension of business or procedure; as, the house of representatives had a *recess* of half an hour."). Such a distinction would have been inconsistent with the legislative practices with which the Framers were familiar. Parliament had long used the term "recess" to describe both inter-session and intra-session recesses. Compare 12 H.L. Jour. 649 (1674) ("His Majesty therefore thinks it fit to make a Recess at this Time * * *. He hath given order to the Lord Keeper to prorogue the Parliament * * *."), with 14 H.L. Jour. 376 (1689) (referring to "Recess at

Christmas"), and 17 H.L. Jour. 601 (1704) (referring to the Christmas "Recess now at Hand"). As Thomas Jefferson explained in the parliamentary manual he created for the Senate, the English Parliament was the most familiar model in that day. See Thomas Jefferson, *A Manual of Parliamentary Practice: For the Use of the Senate of the United States*, Preface (2d ed. 1812) in *Jefferson's Parliamentary Writings: "Parliamentary Pocket-Book" and a Manual of Parliamentary Practice* 355-356 (Wilbur Samuel Howell ed., 1988) (*Jefferson Manual*).

Congress' own usage confirms that the term is not limited to inter-session breaks. For example, in the spring of 1812, Congress debated a proposed intra-session break and, in doing so, repeatedly referred to the intra-session break as a "recess" and used the terms "recess" and "adjournment" interchangeably. See, *e.g.*, 24 Annals of Cong. 1279, 1314-1316, 1334-1342, 1347-1353 (1812). A 1905 Report of the Senate Judiciary Committee, specifically addressing the Recess Appointments Clause, said that the word "recess" is "one of ordinary, not technical signification" and is "used in the constitutional provision in its common and popular sense." S. Rep. No. 4389, 58th Cong., 3d Sess. (1905) (*reprinted in* 39 Cong. Rec. 3823 (1905)). The Committee concluded that the word "recess" refers to "the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions." *Ibid.* The Senate continues to view that Report as authoritative. See *Riddick's Senate Procedure* 947 & n.46 (1992) <http://www.gpoaccess.gov>. To this day, official congressional documents define a "recess" as "any period of three or more complete days—excluding Sundays—when either

the House of Representatives or the Senate is not in session." Joint Committee on Printing, *2003-2004 Congressional Directory* 526 n.2 (*Congressional Directory*). Consistent with that understanding, the Concurrent Resolution authorizing the break during which Judge Pryor was appointed expressly described it as a "reces[s]." H.R. Con. Res. 361, 108th Cong., 2d. Sess. (2004); see also 150 Cong. Rec. S1414 (daily ed. Feb. 12, 2004) (statement of Sen. Frist) (referring to break as a "recess").

ii. Petitioner errs in contending (Pet. 8; see also Kennedy Amicus Br. 6) that the provision's use of the definite article "the" and the singular form "Recess" limit its application to inter-session recesses. To begin with, there is no single recess in each Senate to which the phrase "the recess of the Senate" could apply. The Framers had no background understanding that each Congress would sit for only two sessions, nor does the Constitution restrict a term of Congress to only two sessions. To the contrary, the first, fifth, and eleventh Congresses each held three sessions, as did 25 of the first 76 Congresses; the 67th Congress held four sessions. See *Congressional Directory* 512-518. Even in a two-session Congress, there is more than one Senate recess; there is one recess between sessions and another recess before the beginning of the next Congress.

At the time of the Framing, phrases such as "during the recess" and "in the recess" were widely used to refer to multiple and intra-session recesses. In 1775, for example, the Continental Congress recommended that the colonies create committees of safety to address matters "for the security and defence of their respective colonies, *in the recess* of their assemblies." 11 *Journals of the Continental Congress, 1774-1789*, at 189

(July 18, 1775) (emphasis added). There is no suggestion that the Continental Congress intended that phrase to limit the recesses during which committees of safety should be used. Indeed, the practice of both New York and Pennsylvania (which appointed committees of safety during two intra-session recesses in 1775) bears this out. See, *e.g.*, Agnes Hunt, *The Provincial Committees of Safety of the American Revolution* 64 (1904); 1 Charles Z. Lincoln, *The Constitutional History of New York* 52 (1906); 5 *Series 4*, *American Archives* 655, 673 (M. St. Clair Clarke & Peter Force eds., 1844) (1776); Ch. 716, 8 Pa. Stat. 456 (1770-1776) (session from Oct. 14, 1775 to Sept. 26, 1776). Similarly, other provisions of the Constitution demonstrate that use of the definite article does not limit application of a clause to only a single thing. Article, I, Section 5, Clause 4 provides that "[n]either House, *during the Session of Congress*, shall, without the Consent of the other, adjourn for more than three days" (emphasis added). Because the Constitution elsewhere requires that Congress "shall assemble at least once in every Year" (Art. I, § 4, Cl. 2), thus requiring at least two sessions per Congress, the phrase "during the Session of Congress" could not limit the Clause to a single Session. Thus, construed in its textual and historical context, the phrase "during the Recess" simply refers to any period during which Congress is in "Recess."

iii. Petitioner contends (Pet. 11, see also Kennedy Amicus Br. 6) that the Constitution uses a separate term, "adjourn," to refer to breaks within a session of Congress, citing Article I, Section 5, Clause 4 (quoted above). That argument is without merit. "Adjourn" and "Recess" cannot be neatly cabined, with the former applying to intra-session breaks and the latter to inter-session breaks. "Adjourn" (like "Recess") encompasses

both inter-session and intra-session breaks. In construing the Pocket Veto Clause of the Constitution, which applies when "Congress by their Adjournment prevent" the President from returning a bill (U.S. Const. Art. I, § 7, Cl. 2), this Court made clear that an "Adjournment" includes both "the final adjournment of the Congress" at the end of a session and other "interim adjournment[s]" during sessions. *The Pocket Veto Case*, 279 U.S. 655, 680 (1929). "Adjournment" must include inter-session recesses, because it is undisputed that the Pocket Veto Clause applies at least to such breaks, and amicus Senator Kennedy himself has urged that it applies *only* to such breaks. See *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974). This Court has used the terms interchangeably in the context of the clause petitioner cites. See *Wright* v. *United States*, 302 U.S. 583, 589 (1938) (describing the one-House, three-day, intra-session adjournment permitted by Art. I, § 5, Cl. 4 as "a short *recess* by one House without the consent of the other") (emphasis added); see also *Harris* v. *Board of Governors of the Fed. Reserve Sys.*, 938 F.2d 720, 723 (7th Cir. 1991) (Posner, J.) ("all that 'adjournment' means is that the Congress is in recess"). The same understanding is reflected in Jefferson's parliamentary manual, which explained that Congress may separate in "two ways only": either through "dissolution by the efflux of their time" or through "adjournment." *Jefferson Manual*, *supra*, § LI. Jefferson described this latter type of break as "recess by adjournment." *Ibid.* In authorizing the break during which Judge Pryor was appointed, Congress itself suggested that the terms were interchangeable. See H.R. Con. Res. 361, 108th Cong., 2d Sess. (2004) (describing the Senate as "recessed or adjourned").

iv. Petitioner asserts that it would "make[] no sense" for recess appointments to last almost two years, from near the beginning of one session until "the End of th[e] next Session" (U.S. Const. Art. II, § 2, Cl. 3), which, he claims, demonstrates that the Framers must have intended the Clause to apply only to inter-session recesses. Pet. 9-10; see also Kennedy Amicus Br. 7. Neither the potential length of the term nor its variability renders application of the Clause to intra-session recesses "irrational." Pet. 10. The variability stems from the fact that the Framers chose a single term that would apply well in various circumstances. And there is nothing unique about the variable length of intra-session recess appointments. Recess appointments made during *either* intra-session or inter-session recesses will vary in length depending on Congress' decisions about the number and duration of sessions it determines to hold.

v. The applicability of the Recess Appointments Clause to intra-session recesses is substantiated by longstanding historical practice. See *The Pocket Veto Case*, 279 U.S. at 689 ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions."). For as long as Congress has scheduled frequent intra-session recesses, Presidents have made intra-session recess appointments. Before 1857, Presidents had virtually no occasion to make such appointments. During that period, Congress scheduled only three brief intra-session recesses, for periods of seven, five, and five days, over the Christmas holidays of 1800, 1817, and 1828, respectively. See *Congressional Directory* 512-514. Between 1857 and 1867, Congress scheduled seven such recesses, but none exceeded two weeks. See *id.* at 514-515. In 1867, however, Congress scheduled an intra-

session recess extending from March 30 to July 3. See *id.* at 515. President Johnson made 14 known recess appointments during that period, including the appointment to the district court of Samuel Blatchford (who later served on this Court for 11 years). See Congressional Research Service, *Intrasession Recess Appointments* 5 (Apr. 23, 2004). Despite considerable acrimony between President Johnson and Congress over appointments (that would come to a head when, several months later, Congress impeached President Johnson in part for attempting to remove Secretary of War Edwin Stanton in violation of the Tenure of Office Act, ch. 154, 14 Stat. 430, see generally William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* 212-218 (1992)), Congress appears never to have objected to those appointments.

During the twentieth century, Congress made increasingly frequent use of intra-session recesses. See *Congressional Directory* 519-525. There has been a corresponding increase in the number of intra-session recess appointments. Although amicus (Br. 13) contends that "[o]nly since the 1970s have recess appointments during intra-session adjournments become a more recurrent, rather than sporadic and extraordinary, practice," use of the power became common much earlier. Presidents Harding and Coolidge made intra-session recess appointments. Presidents Roosevelt, Truman, and Eisenhower made a total of 148 known intra-session recess appointments between 1943 and 1960. See *Intrasession Recess Appointments*, *supra*, at 3. Although historical records are incomplete, at least 12 different Presidents have made at least 285 intra-session recess appointments since 1867, including the

appointment of at least 14 Article III judges. See *id.* at 5-32.

That practice of intra-session recess appointments is supported by a line of Executive Branch precedent dating back to Attorney General Daugherty's 1921 opinion on the issue. See 33 Op. Att'y Gen. 20 (1921); accord, *e.g.*, 41 Op. Att'y Gen. 463, 466-469 (1960); 20 Op. Off. Legal Counsel 124, 161 (1996); 16 Op. Off. Legal Counsel 15, 15-16 (1992); 13 Op. Off. Legal Counsel 271, 272-273 (1989); 6 Op. Off. Legal Counsel 585, 588 (1982); 3 Op. Off. Legal Counsel 314, 316 (1979). Attorney General Daugherty's opinion reasoned that the Constitution does not distinguish between inter-session and intra-session recesses, but instead permits appointments unless "in a *practical* sense the Senate is in session so that its advice and consent can be obtained." 33 Op. Att'y Gen. at 21-22. The Attorney General noted that the purpose of the Recess Appointments Clause was to enable the President to "keep * * * offices filled," and thereby prevent any "interval of time where there may be an incapacity of action" by the government, and he stressed that that purpose would be frustrated if intra-session appointments were deemed categorically impermissible. *Id.* at 22-23. The Attorney General further relied on Congress' understanding (as reflected in the 1905 Judiciary Committee report) and judicial precedent (discussed below). See *id.* at 23-24.

Attorney General Daugherty carefully considered the contrary views previously expressed by Attorney General Knox, who had opined that the President could not make intra-session recess appointments. See 33 Op. Att'y Gen. at 21 (citing 23 Op. Att'y Gen. 599 (1901)). Attorney General Knox acknowledged that an intra-session recess "may be a recess in the general and ordinary use of that term." 23 Op. Att'y Gen. at 602. He

also acknowledged that, under his view, the President would be powerless to make any appointments during an intra-session recess of "several months," but he dismissed that concern as a mere "argument from inconvenience." *Id.* at 603. He also acknowledged that his opinion was contrary to judicial precedent, which he dismissed as not "binding authority." *Ibid.* Attorney General Daugherty, after reviewing those arguments with "more than ordinary care," 33 Op. Att'y Gen. at 21, expressly repudiated the opinion as inconsistent with the text and purpose of the Recess Appointments Clause. *Id.* at 21-24. Contrary to petitioner's assertion (Pet. 12) that the permissibility of intra-session recesses has "been the subject of debate for over one hundred years within the Executive Branch itself, without satisfactory resolution," Attorney General Daugherty's conclusion has been repeatedly reaffirmed in at least six formal opinions. See p. 25, *supra* (collecting authorities).[5]

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[5] Petitioner (Pet. 12) and amicus (Br. 12) err in claiming support from Attorney General Daugherty's analysis of the minimum break that could constitute a recess for constitutional purposes. As explained above, the Attorney General first concluded that a 28-day intra-session break clearly *did* constitute a recess for purposes of the Recess Appointments Clause. See 33 Op. Att'y Gen. at 20-24. Then, citing Article I, Section 5, Clause 4, he stated "unhesitatingly" that a break "for only 2 instead of 28 days" did not constitute such a recess. 33 Op. Att'y Gen. at 24. Finally, he stated more equivocally, "Nor do I think an adjournment of 5 or even 10 days can be said to constitute the recess intended by the Constitution." *Id.* at 25. The Attorney General went on, however, to suggest that courts cannot enforce any minimum duration requirement other than the one specifically set forth in Article I, Section 5, Clause 4. He stressed that "the line of demarcation can not be accurately drawn," that the President must have "large, though not unlimited" discretion in making appointments, and that

The Senate also has long acquiesced in the practice. Notwithstanding some 285 intra-session recess appointments over the last 140 years, the Senate appears never to have raised constitutional concerns about the practice. Indeed, the Comptroller General in 1948 endorsed the "accepted view" (28 Comp. Gen. 30, 34) of the President's power reflected by Attorney General Daugherty's 1921 opinion, indicating that four judges that President Truman had appointed during an intra-session recess had been constitutionally seated. *Id.* at 34-37. And, as discussed above, see pp. 14-15, *supra*, Congress has enacted legislation providing for the payment of recess appointees without exempting persons appointed during intra-session recesses.

Only two judicial opinions appear to have addressed the constitutionality of intra-session recess appointments. Both concluded that such appointments were constitutional. See *Gould* v. *United States*, 19 Ct. Cl. 593, 595-596 (1884) ("We have no doubt that a vacancy occurring while the Senate was thus temporarily adjourned * * * , could be and was legally filled by

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"[e]very presumption is to be indulged in favor of the validity of whatever action he may take." *Ibid.* In any event, using traditional measures, Judge Pryor's appointment came during an 11-day recess, rather than a ten-day recess, as petitioner and amicus claim (by excluding the first day). See, *e.g.*, 16 Op. Off. Legal Counsel at 16 (setting forth method of measuring recesses); 13 Op. Off. Legal Counsel 271 (1989) (same); 33 Op. Att'y Gen. at 21, 24 (same). Many Presidents have made intra-session recess appointments during recesses of comparable duration, including Presidents Coolidge (13 days), Reagan (13 days), George H.W. Bush (17 days), and Clinton (9, 10, 11, and 16 days). See *Intrasession Recess Appointments*, *supra*, at 3-4; see also *Recess Appointments of Article III Courts*, *supra*, at 671 (noting that Presidents Lyndon Johnson and Taft made recess appointments of judges during seven- and eight-day recesses, respectively).

appointment of the President acting alone."); *Nippon Steel Corp.* v. *United States Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1374 n.13 (Ct. Int'l Trade 2002) ("The long history of the practice (since at least 1867) without serious objection by the Senate, * * * demonstrates the legitimacy of these appointments.").

vi. Amicus errs in suggesting (Br. 8) that the Clause was intended narrowly "to prevent a crisis in vacancies," and that intra-session recesses do not implicate the purposes of the Clause. That was not the Framers' understanding. As Hamilton explained, the Clause provides "an auxiliary method of appointment, in cases to which the general method was inadequate," *The Federalist No. 67*, *supra*, at 409, and empowers the President to address vacancies "which it might be necessary for the public service to fill without delay." *Id.* at 410; see also 3 *Commentaries on the Constitution*, *supra*, § 804, at 574 (describing the Clause as intended to achieve "convenience, promptitude of action, and general security"). Nothing in those formulations suggests restricting the power to emergency situations. See *Staebler* v. *Carter*, 464 F. Supp. 585, 597 (D.D.C. 1979) ("there is nothing to suggest that the Recess Appointment Clause was designed * * * to be used only in cases of extreme necessity"). Inter-session and intra-session recesses equally implicate the concerns and purpose of the Clause. In neither type of recess is the Senate sitting as a body able to provide its advice and consent.

Nor is there any inherent difference in the length of inter-session and intra-session recesses that would explain the inclusion of one and the exclusion of the other. Nothing in the Constitution suggests that intra-session recesses are necessarily short, or inter-session recesses necessarily long. Inter-session recesses can be

quite short, and indeed, Congress occasionally has eliminated inter-session recesses entirely, as it did in 1867, 1903, and 1941. See *Congressional Directory* 515, 517-518. Founding-era documents indicate an appreciation that intra-session recesses could be lengthy. See *Jefferson Manual*, *supra*, § LI, at 419 (intra-session recess is "a continuance of the session from one day to another, or for a fortnight, a month &c ad libitum"). Congress routinely schedules intra-session recesses of one month or more, as it has done at least eight times during the Administrations of Presidents Clinton and George W. Bush. See *Intrasession Recess Appointments*, *supra*, at 3-4. Moreover, Congress has scheduled a nearly two-month intra-session recess as recently as the Reagan Administration, and two intra-session recesses of more than 100 days as recently as the Truman Administration. See *id.* at 3. A recess-appointment power that could be freely invoked during a one-day inter-session recess, but would be categorically barred during a three-month intra-session recess, would be "irrational" (Pet. 10) and would ill serve the purpose of the Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

JEFFREY P. SINGDAHLSEN
Attorney

SEPTEMBER 2004

APPENDIX

Recess Appointments to the Supreme Court of the United States

Name	Position	Date of Recess Appointment	Action Taken
Potter Stewart	Associate Justice	10/14/1958	Confirmed 5/5/1959
William J. Brennan	Associate Justice	10/15/1956	Confirmed 3/19/1957
Earl Warren	Chief Justice	10/2/1953	Confirmed 3/1/1954
David Davis	Associate Justice	10/17/1862	Confirmed 12/8/1862*
Benjamin R. Curtis	Associate Justice	9/22/1851	Confirmed 12/20/1851*
Levi Woodbury	Associate Justice	9/20/1845	Confirmed 1/3/1846*
John McKinley	Associate Justice	4/22/1837	Confirmed 9/25/1837*
Smith Thompson	Associate Justice	9/1/1823	Confirmed 12/9/1823*
Henry B. Livingston	Associate Justice	11/10/1806	Confirmed 12/17/1806*
Bushrod Washington	Associate Justice	9/29/1798	Confirmed 12/20/1798*
John Rutledge	Chief Justice	7/1/1795	Rejected 12/15/1795
Thomas Johnson	Associate Justice	8/5/1791	Confirmed 11/7/1791*

Unless otherwise indicated, the information set forth in these tables was compiled from records of individual federal judicial appointments maintained by the Office of Legal Policy at the United States Department of Justice.

*Federal Judicial Center, Federal Judges Biographical Database (last modified Sept. 20, 2004) <http://www.fjc.gov/history/home.nsf>.

Recess Appointments of Federal Judges

Judge	Court	Recess Appoint-ment Date	Action Taken
George W. Bush (2001-present)			
William H. Pryor Jr.	11th Cir.	2/20/2004*	N/A
Charles W. Pickering	5th Cir.	1/16/2004	N/A
William J. Clinton (1993-2001)			
Roger L. Gregory	4th Cir.	12/27/2000	Confirmed 7/20/2001
George H.W. Bush (1989-93)			
None			
Ronald W. Reagan (1981-89)			
None			
Jimmy Carter (1977-81)			
Walter M. Heen	D. Haw.	12/31/1980	Recess appointment expired 12/16/1981 after nomination withdrawn 1/22/1981
Gerald R. Ford (1974-77)			
None			
Richard M. Nixon (1969-74)			
None			

Lyndon B. Johnson (1963-69)			
John M. Davis	E.D. Pa.	1/7/1964	Confirmed 3/14/1964
David Rabinovitz	W.D. Wis.	1/7/1964	Service terminated when Congress adjourned 10/4/1964
Aloysius Leon Higginbotham, Jr.	E.D. Pa.	1/6/1964	Confirmed 3/14/1964
Spottswood W. Robinson III	D.D.C.*	1/6/1964	Confirmed 7/1/1964
John F. Kennedy (1961-63)			
William J. Nealon, Jr.	M.D. Pa.	12/13/1962	Confirmed 3/15/1963
Bernard M. Decker	N.D. Ill.	12/12/1962	Confirmed 3/28/1963
James L. Almond	C.C.P.A.	10/23/1962	Confirmed 6/28/1963
Frank Gray, Jr.	M.D. Tenn.	11/20/1961	Confirmed 2/17/1962
Charles Gilbert Neese	E.D. Tenn.	11/20/1961	Confirmed 2/7/1962
Louis Rosenberg	W.D. Pa.	11/20/1961	Confirmed 7/10/1962
Harrison L. Winter	D. Md.	11/9/1961	Confirmed 2/7/1962
Lunsford R. Preyer	M.D.N.C.	10/7/1961	Confirmed 2/7/1962
Clarence W. Allgood	N.D. Ala.	10/5/1961	Confirmed 2/5/1962
Griffin B. Bell	5th Cir.	10/5/1961	Confirmed 2/5/1962

Dudley B. Bonsal	S.D.N.Y.	10/5/1961	Confirmed 3/16/1962
Henry Leo Brewster	N.D. Tex.	10/5/1961	Confirmed 3/16/1962
Irving B. Cooper	S.D.N.Y.	10/5/1961	Confirmed 9/20/1962
Frederick A. Daugherty	E.D. Okla.	10/5/1961	Confirmed 2/7/1952
Wilfred Feinberg	S.D.N.Y.	10/5/1961	Confirmed 3/16/1962
Walter P. Gewin	5th Cir.	10/5/1961	Confirmed 2/5/1962
Ben C. Green	N.D. Ohio	10/5/1961	Confirmed 6/29/1962
Paul R. Hays	2d Cir.	10/5/1961	Confirmed 3/16/1962
Sarah T. Hughes	N.D. Tex.	10/5/1961	Confirmed 3/16/1962
Thurgood Marshall	2d Cir.	10/5/1961	Confirmed 9/11/1962
James L. Noel, Jr.	S.D. Tex.	10/5/1961	Confirmed 3/16/1962
John W. Peck	S.D. Ohio	10/5/1961	Confirmed 4/11/1962
George Rosling	E.D.N.Y.	10/5/1961	Confirmed 3/16/1962
Talbot Smith	E.D. Mich.	10/5/1961	Confirmed 2/5/1962
Adrian A. Spears	W.D. Tex.	10/5/1961	Confirmed 3/16/1962
Dwight D. Eisenhower (1953-61)			
Andrew A. Caffrey	D. Mass.	10/13/1960	Confirmed 8/9/1961

John Feikens	E.D. Mich.	10/13/1960	Recess appointment expired 9/27/1961
Cyrus N. Tavares	D. Haw.	10/13/1960	Confirmed 9/21/1961
Jesse Smith Henley	E.D. Ark.	10/25/1958	Confirmed 9/2/1959
Herbert S. Boreman	4th Cir.	10/17/1958	Confirmed 6/16/1959
Potter Stewart	S. Ct.	10/14/1958	Confirmed 5/5/1959
Edwin A. Robson	N.D. Ill.	9/29/1958	Confirmed 4/29/1959
George L. Hart	D.D.C.	8/29/1958	Confirmed 9/9/1959
Edwin M. Stanley	M.D.N.C.	10/23/1957	Confirmed 2/25/1958
Leonard P. Moore	2d Cir.	9/6/1957	Confirmed 2/25/1958
William J. Brennan	S. Ct.	10/15/1956	Confirmed 3/19/1957
Ewing T. Kerr	D. Wyo.	10/22/1955	Confirmed 3/1/1956
John M. Cashin	S.D.N.Y.	8/17/1955	Confirmed 3/1/1956
Joseph P. Lieb	M.D. Fla.	8/13/1955	Confirmed 3/1/1956
William B. Herlands	S.D.N.Y.	8/12/1955	Confirmed 6/26/1956
Charles W. Kraft, Jr.	E.D. Pa.	8/12/1955	Confirmed 3/28/1956
Robert D. Watkins	D. Md.	8/12/1955	Confirmed 3/1/1956

Edward J. Devitt	D. Minn.	12/10/1954	Confirmed 2/4/1955
Walter M. Bastian	D.C. Cir.	9/20/1954	Confirmed 12/2/1954
Lamar R. Cecil	E.D. Tex.	8/31/1954	Confirmed 12/2/1954
George T. Mickelson	D.S.D.	12/9/1953	Confirmed 2/9/1954
Elmer J. Schnackenberg	7th Cir.	11/17/1953	Confirmed 2/9/1954
Edward W. Day	D.R.I.	11/10/1953	Confirmed 2/9/1954
Carroll C. Hincks	2d Cir.	10/3/1953	Confirmed 2/9/1954
Edwin F. Hunter	W.D. La.	10/3/1953	Confirmed 2/9/1954
Earl Warren	S. Ct.	10/2/1953	Confirmed 3/1/1954
John A. Danaher	D.C. Cir.	10/1/1953	Confirmed 3/30/1954
Harry S. Truman (1945-53)			
Monroe M. Friedman	N.D. Cal.	7/17/1952	Nomination withdrawn 7/24/1953
David N. Edelstein	S.D.N.Y.	11/1/1951	Confirmed 4/7/1952
Ernest A. Tolin	S.D. Cal.	10/30/1951	Confirmed 6/10/1952
Walter M. Bastian	D.D.C.	10/23/1950	Confirmed 12/14/1950
William M. Byrne	S.D. Cal.	9/27/1950	Confirmed 12/13/1950
Oliver J. Carter	N.D. Cal.	9/27/1950	Confirmed 12/13/1950

Robert L. Taylor	E.D. Tenn.	11/2/1949	Confirmed 3/8/1950
Maurice N. Andrews	N.D. Ga.	10/21/1949	Rejected by Senate 8/9/1950
David L. Bazelon	D.C. Cir.	10/21/1949	Confirmed 2/8/1950
Owen M. Burns	W.D. Pa.	10/21/1949	Confirmed 3/8/1950
Thomas J. Clary	E.D. Pa.	10/21/1949	Confirmed 3/8/1950
Charles Fahy	D.C. Cir.	10/21/1949	Confirmed 4/4/1950
Allan K. Grim	E.D. Pa.	10/21/1949	Confirmed 4/4/1950
William H. Hastie	3d Cir.	10/21/1949	Confirmed 7/19/1950
Delmas C. Hill	D. Kan.	10/21/1949	Confirmed 3/8/1950
Frank A. Hooper, Jr.	N.D. Ga.	10/21/1949	Confirmed 2/21/1950
Irving R. Kaufman	S.D.N.Y.	10/21/1949	Confirmed 4/4/1950
James R. Kirkland	D.D.C.	10/21/1949	Confirmed 3/8/1950
John F.X. McGohey	S.D.N.Y.	10/21/1949	Confirmed 3/8/1950
Charles F. McLaughlin	D.D.C.	10/21/1949	Confirmed 2/28/1950
Burnita S. Matthews	D.D.C.	10/21/1949	Confirmed 4/4/1950
Gregory F.X. Noonan	S.D.N.Y.	10/21/1949	Confirmed 4/25/1950

Willis W. Ritter	D. Utah	10/21/1949	Confirmed 6/29/1950
Gus J. Solomon	D. Ore.	10/21/1949	Confirmed 6/27/1950
Sidney Sugarman	S.D.N.Y.	10/21/1949	Confirmed 4/28/1950
Hardress N. Swaim	7th Cir.	10/21/1949	Confirmed 2/8/1950
Carroll O. Switzer	S.D. Iowa	10/21/1949	Rejected by Senate 8/9/1950; resigned 12/26/1950
George T. Washington	D.C. Cir.	10/21/1949	Confirmed 4/28/1950
James S. Wright	E.D. La.	10/21/1949	Confirmed 3/8/1950
David E. Henderson	W.D.N.C.	9/1/1948	Resigned without confirmation 2/13/1949
Roy W. Harper	E.D. Mo. & W.D. Mo.	6/22/1948	Confirmed 1/31/1949
Samuel H. Kaufman	S.D.N.Y.	6/22/1948	Confirmed 1/31/1949
Edward A. Tamm	D.D.C.	6/22/1948	Confirmed 3/29/1949
Roy W. Harper	E.D. Mo. & W.D. Mo.	12/20/1947	Recess appointment expired 6/22/1948*
Sylvester J. Ryan	S.D.N.Y.	11/1/1947	Confirmed 12/18/1947

Roy W. Harper	E.D. Mo. & W.D. Mo.	8/7/1947	Recess appointment expired 12/19/1947*
Edward M. Curran	D.D.C.	10/16/1946	Confirmed 2/3/1947
Richmond B. Keech	D.D.C.	10/14/1946	Confirmed 1/22/1947
Franklin D. Roosevelt (1933-45)			
Guy K. Bard	E.D. Pa.	12/20/1939	Confirmed 4/24/1940
Thomas G. Walker	D.N.J.	12/20/1939	Confirmed 3/5/1940
Alfred D. Barksdale	W.D. Va.	12/19/1939	Confirmed 2/1/1940
Armistead M. Dobie	4th Cir.	12/19/1939	Confirmed 2/1/1940
Michael L. Igoe	N.D. Ill.	11/21/1938	Confirmed 2/9/1939
Otto Kerner	7th Cir.	11/21/1938	Confirmed 2/1/1939
James V. Allred	S.D. Tex.	7/11/1938	Confirmed 2/16/1939
Floyd H. Roberts	W.D. Va.	7/6/1938	Rejected and resigned 2/6/1939
John H. Druffel	S.D. Ohio	9/22/1937	Confirmed 12/8/1937
David J. Davis	N.D. Ala.	12/10/1935	Confirmed 1/22/1936
Seth Thomas	8th Cir.	12/2/1935	Confirmed 1/22/1936

Albert Levitt	D.V.I.	9/20/1935	Resigned without confirmation 7/31/1936
William H. Holly	N.D. Ill.	11/8/1933	Confirmed 2/20/1934
Philip L. Sullivan	N.D. Ill.	11/8/1933	Confirmed 2/20/1934
William Woodburn	D. Nev.	9/23/1933	Declined appointment
James E. Major	S.D. Ill.*	6/12/1933	Confirmed 1/23/1934
Herbert Hoover (1929-33)			
George E.Q. Johnson	N.D. Ill.	8/3/1932	Recess appointment expired 3/4/1933 after nomination rejected 3/3/1933
Daniel W. O'Donoghue	D.D.C.	10/28/1931	Confirmed 1/26/1932
William C. Chestnut	D. Md.	5/9/1931	Confirmed 1/12/1932
Morris A. Soper	4th Cir.	5/6/1931	Confirmed 1/12/1932
Fred D. Letts	D.D.C.	5/5/1931	Confirmed 2/17/1932
James A. Fee	D. Ore.	3/18/1931	Confirmed 12/22/1931
John Knight	W.D.N.Y.	3/18/1931	Confirmed 1/6/1932*

Gunnar H. Nordbye	D. Minn.	3/18/1931	Confirmed 2/3/1932
Calvin Coolidge (1923-29)			
James W. McCarthy	D.N.J.	10/6/1928	Confirmed 1/8/1929 but resigned 1/31/1929
Wayne G. Borah	E.D. La.	10/3/1928	Confirmed 12/17/1928
Nelson McVicar	W.D. Pa.	9/14/1928	Confirmed 12/17/1928
Crate D. Bowen	S.D. Fla.	5/31/1928	Declined appointment
Edgar S. Vaught	W.D. Okla.	5/31/1928	Confirmed 1/8/1929
Edward J. Moinet	E.D. Mich.	6/13/1927	Confirmed 12/19/1927
Ira L. Letts	D.R.I.	6/9/1927	Confirmed 1/4/1928
Simon L. Adler	W.D.N.Y.	5/19/1927	Confirmed 1/16/1928*
Frederick H. Bryant	N.D.N.Y.	5/19/1927	Confirmed 12/19/1927
Frank J. Coleman	S.D.N.Y.	5/19/1927	Confirmed 12/19/1927
Augustus N. Hand	2d Cir.	5/19/1927	Confirmed 1/18/1928
William C. Coleman	D. Md.	4/6/1927	Confirmed 12/19/1927
Johnson J. Hayes	M.D.N.C.	4/6/1927	Confirmed 12/17/1927
Elliott Northcott	4th Cir.	4/6/1927	Confirmed 12/15/1927

William J. Tilson	M.D. Ga.	3/5/1927	Resigned without confirmation 3/19/1928
William J. Tilson	M.D. Ga.	7/6/1926	Nomination withdrawn 2/9/1927
Louis H. Burns	E.D. La.	10/3/1925	Confirmed 12/21/1925
John J. Parker	4th Cir.	10/3/1925	Confirmed 12/14/1925
Harry B. Anderson	W.D. Tenn.	9/12/1925	Confirmed 1/29/1926
Wallace McCamant	9th Cir.	5/25/1925	Resigned 5/2/1926 after nomination rejected 3/17/1926
William L. Clark	D.N.J.	5/21/1925	Confirmed 12/17/1925
Albert W. Johnson	M.D. Pa.	5/21/1925	Confirmed 12/17/1925
Fred M. Raymond	W.D. Mich.	5/8/1925	Confirmed 12/18/1925
Edward J. Henning	S.D. Cal.	4/24/1925	Confirmed 12/15/1925
Merrill E. Otis	W.D. Mo.	3/23/1925	Confirmed 12/14/1925
Ernest F. Cochran	E.D.S.C.	11/22/1923	Confirmed 1/21/1924
Warren G. Harding (1921-23)			
William A. Cant	D. Minn.	5/21/1923	Confirmed 1/15/1924*

John S. Webster	E.D. Wash.	4/28/1923	Confirmed 1/16/1924*
Robert A. Inch	E.D.N.Y.	4/23/1923	Confirmed 1/8/1924
William E. Baker	N.D. W. Va.	4/4/1921	Confirmed 5/3/1921
Claude Z. Luse	W.D. Wis.	4/1/1921	Confirmed 4/27/1921
Woodrow Wilson (1913-21)			
Finis J. Garrett	W.D. Tenn.	11/22/1920	No action taken on nomination 12/7/1920
Thomas G. Haight	3d Cir.	4/1/1919	Confirmed 6/24/1919
James C. Wilson	N.D. Tex.	3/5/1919	Confirmed 6/24/1919
Tillman Johnson	D. Utah	11/2/1915	Confirmed 1/18/1916
Samuel Alschuler	7th Cir.	8/16/1915	Confirmed 1/18/1916
Joseph T. Johnson	W.D.S.C.	3/9/1915	Confirmed 1/24/1916
Rhydon M. Call	S.D. Fla.	3/26/1913	Confirmed 4/24/1913
William H. Taft (1909-13)			
John M. Cheney	S.D. Fla.	8/26/1912	Recess appointment expired 3/9/1913

Clinton W. Howard	W.D. Wash.	8/26/1912	Recess appointment expired 3/4/1913
Clarence J. Roberts	D.N.M.	9/15/1910	Confirmed 12/19/1910
Edmund C. Abbott	D.N.M.	7/5/1910	Recess commission never issued
Oscar R. Hundley	N.D. Ala.	3/6/1909	Recess appointment expired 5/24/1909
Milton D. Purdy	D. Minn.	3/6/1909	Resigned without confirmation 5/1/1909
Theodore Roosevelt (1901-09)			
Milton D. Purdy	D. Minn.	7/6/1908	Recess appointment expired 3/3/1909*
Oscar R. Hundley	N.D. Ala.	5/30/1908	Recess appointment expired 3/3/1909*
John E. Sater	S.D. Ohio	5/30/1908	Confirmed 3/1/1909
Josiah A. Van Orsdel	D.C. Cir.	11/14/1907	Confirmed 12/12/1907
Ralph E. Campbell	E.D. Okla.	11/11/1907	Confirmed 1/13/1908

John H. Cotteral	W.D. Okla.	11/11/1907	Confirmed 1/13/1908
Walter C. Noyes	2d Cir.	9/18/1907	Confirmed 12/10/1907
William B. Sheppard	N.D. Fla.	9/4/1907	Confirmed 5/20/1908
Henry G. Ward	2d Cir.	5/18/1907	Confirmed 12/17/1907
Oscar R. Hundley	N.D. Ala.	4/9/1907	Recess appointment expired 5/30/1908*
William C. Van Fleet	N.D. Cal.	4/2/1907	Confirmed 12/17/1907
Frank S. Dietrick	D. Idaho	3/19/1907	Confirmed 12/17/1907
John E. Sater	S.D. Ohio	3/18/1907	Recess appointment expired
William C. Van Fleet	N.D. Cal.	3/4/1907	Cancelled, but no date given
James L. Martin	D. Vt.	10/20/1906	Confirmed 12/11/1906
Charles H. Robb	D.C. Cir.	10/5/1906	Confirmed 12/11/1906
Joseph Buffington	3d Cir.	9/25/1906	Confirmed 12/11/1906
Nathaniel Ewing	W.D. Pa.	9/25/1906	Confirmed 12/11/1906
Charles E. Wolverton	D. Ore.	11/20/1905	Confirmed 1/15/1906
Louis E. McComas	D.C. Cir.	6/26/1905	Confirmed 12/6/1905

William W. Cotton	D. Ore.	6/17/1905	Declined appointment
Elmer B. Adams	8th Cir.	5/20/1905	Confirmed 12/12/1905
Gustavus Finkelnburg	E.D. Mo.	5/20/1905	Confirmed 12/12/1905
William M. Lanning	D.N.J.	6/1/1904	Confirmed 12/13/1904*
George W. Ray	N.D.N.Y.	9/12/1902	Confirmed 12/8/1902*
Henry C. McDowell	W.D. Va.	11/12/1901	Confirmed 12/18/1901*
Thomas G. Jones	N.D. Ala. & M.D. Ala.	10/7/1901	Confirmed 12/17/1901*
William McKinley (1897-1901)			
George B. Adams	S.D.N.Y.	8/30/1901	Confirmed 12/17/1901*
Benjamin F. Keller	S.D. W. Va.	6/18/1901	Confirmed 12/17/1901*
Andrew McConnell January Cochran	E.D. Ky.	4/24/1901	Confirmed 12/17/1901*
Robert W. Archbald	M.D. Pa.	3/29/1901	Confirmed 12/17/1901*
Jacob Trieber	E.D. Ark.	7/26/1900	Confirmed 1/9/1901*
James E. Boyd	W.D.N.C.	7/11/1900	Confirmed 1/9/1901*
Hamilton G. Ewart	W.D.N.C.	4/13/1899	Recess appointment expired 6/7/1900
George Gray	3d Cir.	3/29/1899	Confirmed 12/18/1899*

Albert C. Thompson	S.D. Ohio	9/23/1898	Confirmed 12/20/1898*
Hamilton G. Ewart	W.D.N.C.	7/13/1898	Recess appointment expired 3/3/1899*
Edward R. Meek	N.D. Tex.	7/13/1898	Confirmed 2/15/1899*
Grover Cleveland (1893-97)			
John H. Rogers	W.D. Ark.	11/27/1896	Confirmed 12/15/1896*
Andrew Kirkpatrick	D.N.J.	11/20/1896	Confirmed 12/15/1896*
William D. McHugh	D. Neb.	11/20/1896	Nomination withdrawn 2/1/1897
Arthur L. Brown	D.R.I.	10/15/1896	Confirmed 12/15/1896*
Charles F. Amidon	D.N.D.	8/31/1896	Confirmed 2/18/1897*
John E. Carland	D.S.D.	8/31/1896	Confirmed 12/15/1896*
Elmer B. Adams	E.D. Mo.	5/17/1895	Confirmed 12/9/1895*
Martin F. Morris	D.C. Cir.	4/15/1893	Unavailable
Benjamin Harrison (1889-93)			
William W. Morrow	N.D. Cal.	9/18/1891	Confirmed 1/11/1892*
John S. Woolson	S.D. Iowa	8/14/1891	Confirmed 1/11/1892*
Henry C. Niles	S.D. Miss. & N.D. Miss.	8/11/1891	Confirmed 1/11/1892*

James H. Beatty	D. Idaho	3/7/1891	Confirmed 2/4/1892*
Alonzo J. Edgerton	D.S.D.	11/19/1889	Confirmed 1/16/1890*
Edward T. Green	D.N.J.	10/24/1889	Confirmed 1/27/1890*
Augustus J. Ricks	N.D. Ohio	7/1/1889	Confirmed 1/16/1890
Charles Swayne	N.D. Fla.	5/17/1889	Confirmed 4/1/1890*
Grover Cleveland (1885-89)			
Emile H. Lacombe	2d Cir.	5/26/1887	Confirmed 2/28/1888*
William J. Allen	S.D. Ill.	4/18/1887	Confirmed 1/19/1888*
Charles H. Simonton	E.D.S.C. & W.D.S.C.	9/3/1886	Confirmed 1/13/1887*
William T. Newman	N.D. Ga.	8/13/1886	Confirmed 1/13/1887*
William M. Merrick	D.D.C.*	5/1/1885	Confirmed 3/30/1886*
Chester A. Arthur (1881-85)			
Walter Q. Gresham	7th Cir.	10/28/1884	Confirmed 12/9/1884*
William A. Woods	D. Ind.	5/2/1883	Confirmed 1/7/1884*
George R. Sage	S.D. Ohio	3/20/1883	Confirmed 1/7/1884*
James A. Garfield (1881)			
Addison Brown	S.D.N.Y.	6/2/1881	Confirmed 10/14/1881*

Alexander Boarman	W.D. La.	5/18/1881	Unavailable
Rutherford B. Hayes (1877-81)			
Ezekiel B. Turner	W.D. Tex.	11/18/1880	Confirmed 12/20/1880*
William H. Hays	D. Ky.	9/6/1879	Confirmed 12/10/1879*
Ulysses S. Grant (1869-77)			
Alexander S. Johnson	2d Cir.	10/25/1875	Confirmed 12/15/1875*
Martin Welker	N.D. Ohio	11/25/1873	Confirmed 12/8/1873*
Nathaniel Shipman	D. Conn.	4/16/1873	Confirmed 12/8/1873*
John M. McKinney	S.D. Fla.	11/8/1870	Confirmed 2/18/1871*
Joel C.C. Winch	E.D. Tex.	10/11/1870	Recess appointment expired 3/4/1871
John P. Knowles	D.R.I.	10/9/1869	Confirmed 1/24/1870*
James M. Clarke	D.R.I.	9/15/1869	Declined appointment
Walter Q. Gresham	D. Ind.	9/1/1869	Confirmed 12/21/1869*
Andrew Johnson (1865-69)			
Samuel Blatchford	S.D.N.Y.	5/3/1867	Confirmed 7/16/1867*
George W. Brooks	E.D.N.C.	8/19/1865	Confirmed 1/22/1866*

John Erskine	S.D. Ga.	7/10/1865	Confirmed 1/22/1866*
Robert P. Dick	W.D.N.C.	5/29/1865	Declined appointment
Abraham Lincoln (1861-65)			
Richard Busteed	N.D. Ala. & S.D. Ala. & M.D. Ala.	11/17/1863	Confirmed 1/20/1864*
Thomas J. Boynton	S.D. Fla.	10/19/1863	Confirmed 1/20/1864*
Mark W. DeLahay	D. Kan.	10/6/1863	Confirmed 3/15/1864*
William Lawrence	S.D. Fla.	9/9/1863	Declined appointment
John A. Bingham	S.D. Fla.	6/4/1863	Recess appointment expired 7/4/1864
Edward H. Durell	E.D. La.	5/20/1863	Confirmed 2/17/1864*
John C. Underwood	E.D. Va.	3/27/1863	Confirmed 1/25/1864*
David Davis	S. Ct.	10/17/1862	Confirmed 12/8/1862*
Bland Ballard	D. Ky.	10/16/1861	Confirmed 1/22/1862*
James Buchanan (1857-61)			
William G. Jones	S.D. Ala. & N.D. Ala. & M.D. Ala.	9/29/1859	Confirmed 1/30/1860*

Franklin Pierce (1853-57)			
James Dunlop	D.C. Cir. (Chief Judge)	11/27/1855	Confirmed 12/7/1855*
George W. Hopkins	D.C. Cir.	10/5/1855	Recess appointment expired 8/30/1856
James M. Love	S.D. Iowa	10/5/1855	Confirmed 2/25/1856*
William F. Giles	D. Md.	7/18/1853	Confirmed 1/11/1854
Millard Fillmore (1850-53)			
Benjamin R. Curtis	S. Ct.	9/22/1851	Confirmed 12/20/1851*
Zachary Taylor (1849-50)			
Daniel Ringo	E.D. Ark. & W.D. Ark.	11/5/1849	Confirmed 5/10/1850*
Henry Boyce	W.D. La.	5/9/1849	Confirmed 8/2/1850*
James K. Polk (1845-49)			
James Dunlop	D.C. Cir.	10/3/1845	Confirmed 2/3/1846*
Levi Woodbury	S. Ct.	9/20/1845	Confirmed 1/3/1846*
John Tyler (1841-45)			
None			
W.H. Harrison (1841)			
None			

Martin Van Buren (1837-41)			
Robert B. Gilchrist	E.D.S.C. & W.D.S.C.	10/30/1839	Confirmed 2/17/1840*
John C. Nicoll	N.D. Ga. & S.D. Ga.	5/11/1839	Confirmed 2/17/1840*
John McKinley	S. Ct.	4/22/1837	Confirmed 9/25/1837*
Andrew Jackson (1829-37)			
Jesse L. Holman	D. Ind.	9/16/1835	Confirmed 3/29/1836*
Benjamin Tappan	D. Ohio	10/12/1833	Rejected 12/26/1833
Thomas Irwin	W.D. Pa.	4/14/1831	Confirmed 3/21/1832*
Mathew Harvey	D.N.H.	11/2/1830	Confirmed 12/16/1830*
Philip P. Barbour	E.D. Va.	10/8/1830	Confirmed 12/16/1830*
John Q. Adams (1825-29)			
William Creighton, Jr.	D. Ohio	11/1/1828	Recess appointment expired 12/31/1828
Joseph Hopkinson	E.D. Pa.	10/23/1828	Confirmed 2/23/1829*
William Rossell	D.N.J.	11/10/1826	Confirmed 12/19/1826*
John Boyle	D. Ky.	10/20/1826	Confirmed 2/12/1827*
Alfred Conkling	N.D.N.Y.	8/27/1825	Confirmed 12/14/1825*

George Hay	E.D. Va.	7/5/1825	Confirmed 3/31/1826*
James Monroe (1817-25)			
Elias Glenn	D. Md.	8/31/1824	Confirmed 1/3/1825*
John Pitman	D.R.I.	8/4/1824	Confirmed 1/3/1825*
Smith Thompson	S. Ct.	9/1/1823	Confirmed 12/9/1823*
Peter Randolph	D. Miss.	6/25/1823	Confirmed 12/9/1823*
Willard Hall	D. Del.	5/6/1823	Confirmed 12/9/1823*
Jeremiah Cuyler	D. Ga.	6/12/1821	Confirmed 1/10/1822*
Thomas U.P. Charlton	D. Ga.	5/15/1821	Unavailable
Roger Skinner	N.D.N.Y.	11/24/1819	Confirmed 1/5/1820*
Theodorick Bland	D. Md.	11/23/1819	Confirmed 1/5/1820*
James Madison (1809-17)			
William S. Pennington	D.N.J.	6/19/1815	Confirmed 1/9/1816*
Theodore Gaillard	D. La.	4/13/1813	Unavailable
Thomas Jefferson (1801-09)			
Henry B. Livingston	S. Ct.	11/10/1806	Confirmed 12/17/1806*
Matthias B. Tallmadge	N.D.N.Y.	6/12/1805	Confirmed 12/23/1805*

Henry B. Livingston	D.N.Y.	5/16/1805	Recess appointment expired 4/21/1806
William Stephens	D. Ga.	10/22/1801	Confirmed 1/26/1802*
Dominick A. Hall	5th Cir.	7/1/1801	Confirmed 1/26/1802*
Theodore Gaillard	5th Cir.	5/30/1801	Unavailable
Henry Potter	5th Cir.	5/9/1801	Confirmed 1/26/1802*
David L. Barnes	D.R.I.	4/30/1801	Confirmed 1/26/1802*
William Kilty	D.C. Cir.	3/23/1801	Confirmed 1/26/1802*
John Adams (1797-1801)			
James Winchester	D. Md.	10/31/1799	Confirmed 12/10/1799*
Bushrod Washington	S. Ct.	9/29/1798	Confirmed 12/20/1798*
George Washington (1789-97)			
Benjamin Bourne	D.R.I.	10/13/1796	Confirmed 12/22/1796*
Joseph Clay, Jr.	D. Ga.	9/16/1796	Confirmed 12/27/1796*
John Rutledge	S. Ct.	7/1/1795	Rejected 12/15/1795
Samuel Hitchcock	D. Vt.	9/3/1793	Confirmed 12/30/1793*
Thomas Johnson	S. Ct.	8/5/1791	Confirmed 11/7/1791*

William Lewis	D. Pa.	7/14/1791	Confirmed 11/7/1791*
Robert Morris	D.N.J.	8/28/1790	Confirmed 12/20/1790*
William Paca	D. Md.	12/22/1789	Confirmed 2/10/1790*
Cyrus Griffin	D. Va.	11/28/1789	Confirmed 2/10/1790*

Number of Judicial Recess Appointments by President[1]

U.S. President	Number of Recess Appoint-ments	Number of Recess Appointments Later Confirmed
George W. Bush (2001-present)	2	N/A
William J. Clinton (1993-2001)	1	1/1
George H.W. Bush (1989-93)	0	N/A
Ronald W. Reagan (1981-89)	0	N/A
Jimmy Carter (1977-81)	1	0/1
Gerald R. Ford (1974-77)	0	N/A
Richard M. Nixon (1969-74)	0	N/A
Lyndon B. Johnson (1963-69)	4	3/4
John F. Kennedy (1961-63)	25	25/25
Dwight D. Eisenhower (1953-61)	27	26/27
Harry S. Truman (1945-53)	37	32/37
Franklin D. Roosevelt (1933-45)	15	13/15
Herbert Hoover (1929-33)	8	7/8
Calvin Coolidge (1923-29)	24	22/24
Warren G. Harding (1921-23)	5	5/5
Woodrow Wilson (1913-21)	7	6/7
William H. Taft (1909-13)	5	1/5

[1] This table does not include: (1) nominees who declined the appointment; (2) those for whom the recess commission was never issued or the nomination was withdrawn or cancelled before the Senate had an opportunity to act; and (3) those as to whom it was unclear whether the commission was issued or accepted or whether the nominee was subsequently confirmed. Judge Walter M. Heen (appointed Dec. 31, 1980) is included in this table because he continued to preside over cases after President Reagan withdrew his nomination on Jan. 22, 1981.

Theodore Roosevelt (1901-09)	25	21/25
William McKinley (1897-1901)	11	9/11
Grover Cleveland (1893-97)	6	6/6
Benjamin Harrison (1889-93)	8	8/8
Grover Cleveland (1885-89)	5	5/5
Chester A. Arthur (1881-85)	3	3/3
James A. Garfield (1881)	1	1/1
Rutherford B. Hayes (1877-81)	2	2/2
Ulysses S. Grant (1869-77)	7	6/7
Andrew Johnson (1865-69)	3	3/3
Abraham Lincoln (1861-65)	8	7/8
James Buchanan (1857-61)	1	1/1
Franklin Pierce (1853-57)	4	3/4
Millard Fillmore (1850-53)	1	1/1
Zachary Taylor (1849-50)	2	2/2
James K. Polk (1845-49)	2	2/2
John Tyler (1841-45)	0	N/A
W.H. Harrison (1841)	0	N/A
Martin Van Buren (1837-41)	3	3/3
Andrew Jackson (1829-37)	5	4/5
John Q. Adams (1825-29)	6	5/6
James Monroe (1817-25)	8	8/8
James Madison (1809-17)	1	1/1
Thomas Jefferson (1801-09)	8	7/8
John Adams (1797-1801)	2	2/2
George Washington (1789-97)	9	8/9