

RECESS APPOINTMENTS

Brief by Edward M. Kennedy (additional counsel listed in brief) before the U.S. Court of Appeals for the Eleventh Circuit

June 6, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-15783

Albert ADEFEMI,
Petitioner-Appellant,

v.

John ASHCROFT, et al.,
Respondents-Appellees

No. 02-12924

UNITED STATES,
Plaintiff-Appellee,

v.

Carl M. DRURY, Jr.,
Defendant-Appellant

No. 01-16485

UNITED STATES,
Plaintiff-Appellee,

v.

Deborah STANFORD
Claimant-Appellant

BRIEF OF *AMICUS CURIAE*, UNITED STATES SENATOR EDWARD M. KENNEDY, PRO SE, SUGGESTING LACK OF JURISDICTION ON THE GROUND THAT JUDGE PRYOR'S APPOINTMENT TO THIS COURT IS UNCONSTITUTIONAL

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[*Editors' note:* Superfluous front matter and the tables of contents and authorities have been omitted.]

[*1] IDENTITY AND INTEREST OF THE AMICUS

Amicus Edward M. Kennedy has been a United States Senator from the Commonwealth of Massachusetts since his election in November 1962. He has remained in that office continuously since then, having been re-elected in 1964, 1970, 1976, 1982, 1988, 1994, and 2000. He is the second-most senior member of the Senate and has served on its Committee on the Judiciary continuously since becoming a Senator, serving as its Chairman from 1979-1981. In the Committee and on the Senate floor, he has participated in the constitutional “advice and consent” function with respect to the appointment of virtually every United States Judge since the start of the First Session of the 88th Congress.

Senator Kennedy has a longstanding and substantial interest in assuring that the constitutional roles and prerogatives of the Senate are not compromised, that the division and separation of powers among the Branches enshrined in the Constitution are preserved and protected, that the independence of the Judicial Branch from the Executive Branch guaranteed in Article III of the Constitution is not breached, and, in particular, that those who have not been appointed as judges of courts of the United States in accordance with the applicable constitutional and statutory provisions are not permitted to jeopardize and interfere with the proper operation of the courts by participating in cases that the Constitution prohibits them from deciding.

[*2] Amicus specifically participated actively in the Senate Judiciary Committee’s consideration of the nomination of William Pryor, Jr., to this Court. He also participated in the Senate debate on whether, under the Senate’s Rules, the Senate should proceed with that nomination, and, upon the votes to determine whether the Senate would do so, voted with the prevailing side against proceeding to confirm him.

SOURCE OF AUTHORITY TO FILE

Together with this brief, amicus has filed a motion for leave to file a brief amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

Whether an intra-session recess appointment of a judge to an Article III court violates the U.S. Constitution.

BACKGROUND

President Bush nominated William Pryor to fill a vacancy on this Court on April 9, 2003, early in the First Session of the 108th Congress. 149 Cong. Rec. S5101 (daily ed. Apr. 9, 2003). The Senate Judiciary Committee held a hearing on Judge Pryor's nomination on June 11, 2003. *See Judicial and Executive Nominations Before the S. Comm. on the Judiciary*, 108th Cong. (June 11, 2003), available at <http://judiciary.senate.gov/hearing.cfm?id=802>.

[*3] During the First Session of the 108th Congress, the Senate debated the nomination over the course of several days. A number of Senators opposed the nomination. *See* 149 Cong. Rec. S10,455 (daily ed. July 31, 2003); 149 Cong. Rec. S14,085 (daily ed. Nov. 6, 2003). Under Rule 22 of the Rules of the Senate, adopted pursuant to Article I, Section 5 of the Constitution, proponents of the nomination twice attempted to terminate debate and proceed to a vote on the nomination. Both attempts failed, *see* 149 Cong. Rec. S10,455 (daily ed. July 31, 2003); 149 Cong. Rec. S14,085 (daily ed. Nov. 6, 2003), and therefore the Senate did not confirm the nominee during its First Session. That Session ended on December 9, 2003, and the ensuing Senate Recess lasted until January 20, 2004.¹

On the evening of Thursday, February 12, 2004, the Senate adjourned for ten days for the Presidents' Day holiday until Monday, February 23, a period encompassing five business days, a three-day holiday weekend, and a two-day weekend. 150 Cong. Rec. S1413 (daily ed. Feb. 12, 2004). President Bush announced Judge Pryor's recess appointment on the afternoon of Friday, February 20, 2004,

¹ The nomination was effectively withdrawn and a new nomination of Mr. Pryor made on March 11, 2004. *See President's Nominations Submitted to the Senate*, Weekly Comp. Pres. Doc. Vol. 40, Number 11, at 401 (Mar. 15, 2004). No steps to proceed with this re-nomination have been taken.

the last business day before the Congress returned from its ten-day adjournment. As discussed in the Argument below, that brief adjournment is by far [*4] the shortest intra-session “recess” during which a President has ever invoked the Recess Appointments Clause to appoint an Article III judge.

SUMMARY OF THE ARGUMENT

The appointment of Judge Pryor is unconstitutional. An intra-session adjournment is not “the Recess” to which the Recess Appointments Clause refers. Moreover, even if (contrary to our argument) the phrase “the Recess” is a “practical” rather than literal construction, there is *no* “practical” justification for construing “the Recess” to include an intra-session adjournment *for purposes of an appointment to an Article III judgeship*. Indeed, these appointments cause such profound harm to the judicial independence guaranteed by Article III that on any practical construction of the Recess Appointments Clause, which must account for *constitutional* principles and consequences, intra-session appointments of judges ought to be especially disfavored.

ARGUMENT

I. THE CONSTITUTION DOES NOT AUTHORIZE RECESS APPOINTMENTS – PARTICULARLY OF ARTICLE III JUDGES – DURING INTRA-SESSION SENATE ADJOURNMENTS

The text, original understanding, and purpose of the Recess Appointments Clause all demonstrate that an intra-session Senate adjournment is not “the Recess” [*5] to which the Clause refers. At the very least, the Clause does not authorize intrasession appointments of Article III judges.²

² By authorizing the President to “fill up all Vacancies that may happen during the Recess of the Senate,” the Recess Appointments Clause can be interpreted as authorizing recess appointments only to fill vacancies actually created-“happen” - during inter-session recesses. Although two federal courts have rejected this construction, see *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir.) (en banc), *cert. denied*, 475 U.S. 1048, 106 S. Ct. 1269 (1985); *United States v. Allocco*,

A. The Text Of The Recess Appointments Clause

The Recess Appointments Clause provides that “[t]he 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. I, § 2, cl. 3 (emphasis added). Any analysis of the Constitution must begin with the plain language of the text. See, e.g., *Solorio v. United States*, 483 U.S. 435, 447, 107 S. Ct. 2924, 2931 (1987). The Framers’ use of the definite article “the,” and of the singular, rather than the plural, form of “Recess,” both indicate that the Constitution refers to one specific “Recess” – that is, the recess that occurs between sessions of Congress (including the period *between* the Second Session of one Congress and the First Session of the next). If the Framers had [*6] intended to authorize the President to make appointments during breaks *within* a session, they could easily have drafted the Clause using the plural form “Recesses,” the singular indefinite “a Recess,” or another phrase altogether, such as “during adjournments” or “when the Senate is not in session.”

However, the Framers chose not to use these alternatives because “Recess,” the word they used, was a term of art that referred specifically to the break between the generally uninterrupted sessions of Congress. Indeed, elsewhere the Framers did use a different term – “adjourn” – to refer to a cessation of legislative business that occurs *during* sessions of Congress. Article I of the Constitution directs that “[n]either House, *during* the Session of Congress, shall, without the Consent of the other, *adjourn* for more than three days” U.S. Const. art. I, § 5, cl. 4 (emphases added). By choosing the term “the Recess” in Article II, rather than referring to a period in which Congress was merely “adjourn[ed],” the Framers thus made

305 F.2d 704, 709-14 (2d Cir. 1962), *cert. denied*, 371 U.S. 964, 83 S. Ct. 545 (1963), that conclusion is subject to serious challenge. See, e.g., William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 21 Const. Comment. (forthcoming 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=542902; Recent Case, *President Has Power to Issue Recess Commission to Federal Judge When Vacancy First Arises During Session of Senate*, 111 U. Pa. L. Rev. 364, 368 (1963).

clear that the Recess Appointments Clause was to be used only during the breaks that occur *between* sessions of Congress. Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-66, 110 S. Ct. 1056, 1060-61 (1990) (differentiating between “the people” and “person” or “accused” as used in various constitutional amendments). Interpreting the Recess Appointments Clause as authorizing appointments only during inter-session recesses is the only construction that gives [*7] meaning to the Framers’ use of two different terms – “the Recess” and “Adjourn” – to describe the different kinds of breaks in the legislative schedule.

This reading of the Clause is confirmed by the Clause’s provision that a recess appointee’s commission “shall expire at the End of [the Senate’s] next Session.” Reading the Clause to permit intra-session appointments would mean that a recess appointment would be valid not only during the remainder of the session in which the appointment was made, but until the end of the following session. This would result in an absurd situation that the Framers could not have envisioned. Judge Pryor, for instance, was appointed in February 2004, very early in the Second Session of the 108th Congress. Reading “the Recess” to include the ten-day February adjournment, Judge Pryor’s commission would last nearly *two years*, until the conclusion of the First Session of the 109th Congress at the end of 2005 – a result that serves none of the purposes of the Clause and that the Framers certainly could not have intended, given their careful and deliberate decision to check the President’s appointment power by requiring Senate consent, *see infra* Part I.B. By contrast, construing “the Recess” to refer only to an inter-session recess comports with common sense: The Framers intended a recess appointee to serve until the end of the “next Session” – that is, the new Senate session that begins at the end of “the Recess” during which the appointment was made. Such a process would provide the Senate, upon its return, with one full session in which to [*8] decide whether to consent to the President’s nomination – certainly sufficient time for the Senate to play its constitutional role. By contrast, allowing a recess appointee to serve without Senate consent for virtually two full years serves no conceivable constitutional end.

B. Constitutional Purpose and Function

The purpose of the Recess Appointments Clause was to permit the President to temporarily appoint officers when “the Recess” – which at the time of the founding meant the lone, lengthy inter-session break – prevents the Senate from fulfilling its constitutional role in the usual appointments process. Because intra-session adjournments do not generally implicate the purpose of the Clause, there is no basis for construing the Clause to encompass such adjournments.

The Framers intended to give the Senate an important check on the President’s power to appoint officers of the United States, including federal judges. U.S. Const. art. II, § 2, cl. 2. The Framers were determined “to limit the distribution of the power of appointment” – a power “deemed ‘the most insidious and powerful weapon of eighteenth century despotism.’” *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 883-84, 111 S. Ct. 2631, 2641 (1991) (quoting Gordon Wood, *The Creation of The American Republic 1776-1787*, at 143 (1969)). The Constitution thus divides “the power to appoint the principal federal officers . . . between the Executive and Legislative Branches,” *id.* at 884, by requiring “the [*9] Advice and Consent of the Senate” for the President’s appointment of such officers, including federal judges, U.S. Const. art. II, § 2, cl. 2. This division was basic to the balance of powers envisioned by the Framers.

Against this general principle, the Recess Appointments Clause was intended to prevent a crisis in vacancies that might result if this procedure were required when the Senate was disabled from fulfilling its advice-and-consent function. Alexander Hamilton described the recess-appointment power as “nothing more than a supplement to” the ordinary appointment process for “cases to which the general method was inadequate.” *The Federalist* No. 67, at 391 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Hamilton noted that the ordinary appointment process “is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate.” *Id.* The Recess Appointments Clause was required “as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay.” *Id.* Thus, the

recess-appointment power was crafted to ensure “convenience, promptitude of action, and general security” and to avoid the burden and expense of requiring “that the senate should be perpetually in session” to consider the President’s appointments. 3 Joseph Story, *Commentaries on the Constitution* § 1551 (1833); see also 1 Op. Att’y Gen. 631, 632 (1823) (noting that the “meaning” of the Clause is that the President may fill a vacancy “which the public interests require to be [*10] immediately filled” when “the advice and consent of the Senate cannot be immediately asked, because of their recess”).

In dealing with a provision, such as the Recess Appointments Clause, that departs from the Constitution’s basic separation-of-powers framework, courts must interpret the provision in accord with the “specific purpose it is intended to serve.” *Kennedy v. Sampson*, 511 F.2d 430, 437 (D.C. Cir. 1974) (construing the Pocket Veto Clause not to apply to an intra-session adjournment of Congress); see also *Wright v. United States*, 302 U.S. 583, 596, 58 S. Ct. 395, 400 (1938) (noting that the Pocket Veto Clause should be construed to effectuate its “two fundamental purposes”). The Recess Appointments Clause represents an “exception” to the general separation-of-powers framework of the Constitution, and of the Appointments Clause in particular. It authorizes the President to act in an exceptional manner when Congress’s absence prevents it from performing its constitutional functions. It should therefore be construed to apply narrowly to an actual inter-session “Recess.” Otherwise, the President will be able to aggrandize his power at the expense of the Senate by invoking an *exceptional* power – conferred upon him only for the rare situations in which the Senate cannot give advice and consent – and using it during brief Senate adjournments in which there is no such emergency need.

[*11] Modern intra-session Senate adjournments do not implicate the “specific purpose” of the Recess Appointments Clause because during such adjournments the Senate is not entirely “absent so that it can not receive communications from the President or participate as a body in making appointments.” 33 Op. Att’y Gen. 20, 25 (1921). Unlike inter-session recesses in the early Congresses, which

lasted for months, the “overwhelming majority of intra-session recesses last less than twenty days.” Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2240 (1994) (citing U.S. Gov’t Printing Office, *1993-1994 Official Congressional Directory: 103d Congress* 580-90 (1993)). During the Second Session of the 107th Congress, for example, the Senate had six intra-session adjournments, none longer than eighteen days except for the summer recess of thirty-four days. See U.S. Gov’t Printing Office, *2003-2004 Official Congressional Directory: 108th Congress* 525 (2004). “Only four intrasession recesses in history have exceeded sixty days, and none of these occurred in the past forty years.” Carrier, *supra*, at 2240; see also Sampson, 511 F.2d at 441 (“[I]ntrasession adjournments of Congress have virtually never occasioned interruptions of [great] magnitude.”). Moreover, as explained below, such adjournments do not interrupt the processing of nominations in the Senate. Modern intra-session adjournments do not undermine the President’s ability to receive the advice and consent of the Senate, [*12] and therefore ought not be considered a “Recess” for purposes of the Recess Appointments Clause.

C. Department of Justice Opinions

With the exception of one minor and immaterial dictum, no court has addressed whether the President has the constitutional authority to make a recess appointment during an *intra-session* Senate adjournment that is not a formal recess.³ Therefore, to defend such appointments, the Executive Branch has relied almost exclusively on (i) a 1921 Attorney General Opinion and (ii) the history of intra-session appointments. But neither of those sources provides credible authority for the constitutionality of Judge Pryor’s intra-session appointment.

Most Attorneys General Opinions are written on behalf of the Executive to defend presidential prerogatives vis-à-vis Congress. As

³ *Gould v. United States*, 19 Ct. Cl. 593, 596 (1884) (commenting that the legality of the intra-session recess appointment was “immaterial” to the question presented).

such, a court should accord them no precedential value and should consider them only to the extent that they are persuasive. *Cf. Crandon v. United States*, 494 U.S. 152, 177-78, 110 S. Ct. 997, 1011-12 (1990) (Scalia, J., concurring in the judgment); *see also* Henry M. Hart, Jr., Letter, *Harv. L. Sch. Rec.*, Oct. 8, 1953, at 2 [hereinafter Hart Letter], reprinted in *Recess Appointments to the Supreme Court – Constitutional But [*13] Unwise?*, 10 *Stan. L. Rev.* 124, 127 n.12 (1957) (“[O]ccasional practice backed by mere assumption cannot settle a basic question of constitutional principle.”).

This is especially true when, as here, those Opinions are inconsistent. Because there was with one exception virtually no use of the recess-appointment power before the Twentieth Century, the Executive’s first known consideration of the question occurred in 1901, when Attorney General Knox stated that the recess-appointment power is limited to *inter-session* appointments, i.e., those made *between* sessions of Congress. 23 *Op. Att’y Gen.* 599, 600 (1901).

In 1921, however, Attorney General Daugherty “overruled” the Knox opinion, *see* 3 *Op. Off. Legal Counsel* 314, 315 (1979), concluding that the President could make recess appointments during an intra-session adjournment. 33 *Op. Att’y Gen.* 20 (1921). Attorney General Daugherty conceded that he was making a “practical construction” of the Constitution. *Id.* at 22. He did not even attempt to justify his conclusion in light of the plain language, structure, or history of Article II. The 1921 Opinion was limited in its assertion of presidential authority. The “real question,” in Attorney General Daugherty’s view, was “whether *in a practical sense* the Senate is in session *so that its advice and consent can be obtained.*” *Id.* at 21-22 (emphasis added). He concluded that an intra-session adjournment could be deemed a “recess” only in circumstances in which the Senate is “absent so that it can not receive communications from the President [*14] or participate as a body in making appointments.” *Id.* at 25. “[L]ooking at the matter from [such] a practical standpoint,” Daugherty reasoned that “no one” would view an adjournment “for 5 or even 10 days” as satisfying that prerequisite. *Id.*

Subsequent opinions of an Acting Attorney General and of the Office of Legal Counsel have uncritically followed the 1921 Daugherty Opinion without offering any additional significant constitutional defense of intra-session recess appointments and by consistently avoiding textual analysis of the Recess Appointments Clause.⁴ See Carrier, *supra*, at 2236-38. In particular, those Opinions have offered no explanation beyond Executive expediency as to why the President should act in accord with Daugherty's questionable Opinion rather than following the sounder conclusion that General Knox reached in 1901, a conclusion that comports with the text, history, and purpose of Article II.

Even on their own terms, these Attorneys General Opinions would not justify Judge Pryor's appointment: They explicitly permit intra-session recess appointments only when it is *practically impossible* for the President to obtain the Senate's advice and consent because the Senate cannot receive presidential communications and cannot "participate" in its constitutionally assigned functions. [*15] See, e.g., 1996 OLC Memo, *supra*, at *122 n.102; 16 Op. Off. Legal Counsel 15, 15-16 (1992); 41 Op. Att'y Gen. 463, 467 (1966). Even a much longer adjournment than the ten days at issue here would not have the disabling "practical" effect that Daugherty feared, because today's Senate can receive presidential nominations during adjournments, and the Senate Committees can and do commence or continue the advice-and-consent process during such adjournments.⁵ See Carrier, *supra*, at 2241-43. Thus, whether it is to-

⁴ E.g., Off. Legal Counsel, *The Constitutional Separation of Powers Between the President and Congress*, 1996 OLC LEXIS 6, at *121 (1996), available at <http://www.usdoj.gov/olc/delly.htm> [hereinafter 1996 OLC Memo]; 41 Op. Att'y Gen. 463, 466-69 (1960).

⁵ The Senate has authorized its Secretary to receive messages from the President, including nominations, which the Secretary then refers to the appropriate committee. See 149 Cong. Rec. S8 (daily ed. Jan. 7, 2003). A committee that receives a nomination during an intra-session recess can initiate the advice-and-consent process during the recess if necessary. The Senate rules authorize each committee "to hold . . . hearings," to require "the attendance of . . . witnesses," and "to take . . . testimony" during the "sessions, recesses, and adjourned periods of the Senate." Senate Standing Rule 26.1. For example, during the intra-session recess

day incorrect to assume that adjournments of “substantial” length — such as a month-long summer adjournment or a two-month election-related adjournment — could ever meet Attorney General Daugherty’s test under certain circumstances, surely Daugherty was correct in concluding that a ten-day adjournment, such as in the present case, does *not* suffice, *see* 33 Op. Att’y Gen. 20, 25 (1921). It would be frivolous to argue that such an adjournment is “protracted enough to prevent [the [*16] Senate] from performing its functions of advising and consenting to executive nominations.” 41 Op. Att’y Gen. 463, 466 (1966); *see also id.* at 469.

In the current case, the February recess in fact did not prevent the Senate from performing its function of advice and consent for Executive nominations. On the contrary, the Pryor nomination was communicated to the Senate ten months earlier; had been the subject of Judiciary Committee inquiries, hearings, and action; had been debated on the Senate floor twice; and had twice failed to obtain enough votes to go forward under Senate rules. Beginning on the very next business day after the purported recess appointment, the proponents of the nomination could have immediately resumed the Senate’s “participation” in the constitutional process. Plainly, what prompted this recess appointment was not the Executive’s disappointment that the Senate could not “participate” because of the holiday recess, but rather the Executive’s effort to bypass the Senate’s constitutionally assigned role. In the present case, the Pryor appointment was made on Friday when the Senate was returning to session on the following Monday. The Senate is rarely in session on a Saturday or Sunday. If the current appointment is upheld, this Court will be ruling that a recess appointment made after the Senate adjourns on any Friday would be valid even if the Senate is only in recess for the weekend, and the advice-and-consent function of the Senate would be a dead letter.

[*17] To the extent that the constitutional calculus should, as Attorney General Daugherty suggested, take account of the “practical”

from January 7 to January 20, 1993, Senate committees “considered nearly every one of President-elect Clinton’s cabinet nominations.” Carrier, *supra*, at 2242 (citing 139 Cong. Rec. D46-48 (daily ed. Jan. 20, 1993)).

effects of an intra-session “recess” appointment, surely those practical effects must necessarily include constitutional consequences. As explained in Part II, recess appointments to Article III judgeships result in profound harm to the judicial independence guaranteed by Article III. In cases such as this, in which the President appoints a judicial nominee whom the Senate has already refused to confirm, such appointments directly undermine the Senate’s advice-and-consent function. Thus, far from alleviating a situation in which the Senate is, by virtue of its absence, unable to perform its advice-and-consent function, the intra-session recess appointment here undermines that function. It empowers the President to use any long weekend or holiday when the Senate is not in session as an excuse to install temporary judges in office even when the Senate has declined to confirm them – judges who have therefore not taken office pursuant to the democratic checks and balances that the Constitution prescribes.

D. The History Of Recess Appointments

Nor can the Department of Justice plausibly rely on the “[p]ast practice” of intra-session recess appointments to sustain the constitutionality of the practice. *See, e.g.*, 16 Op. Off. Legal Counsel 15, 16 (1992). Use of the recess-appointment power during short intra-session adjournments has no venerable historical pedigree. Like the legislative veto [*18] invalidated in *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764 (1983), the intra-session recess appointment has become an all-too-common phenomenon – but the history of its use is both recent and sporadic. Indeed, it is a practice that has only flourished in recent years precisely *because* of, and pursuant to, the post-1920 Opinions of the Attorneys General.

As of 1901, when the Executive Branch first considered – and *rejected* – the constitutionality of the practice, records reveal only a handful of instances of nonmilitary intra-session recess appointments, all made by President Andrew Johnson in 1867. *See* Henry B. Hogue, Cong. Res. Serv., *Intrasession Recess Appointments* 3, 5 (Apr. 23, 2004) [hereinafter 4/23/04 CRS Report]. Even after the 1921 Daugherty Opinion opened the door to the practice, Presi-

dents made fewer than a dozen intra-session appointments between 1921 and 1947 – none of them to an Article III judgeship. *Id.* at 3, 7-9. During the period between 1947 and 1954, a small cluster of intra-session appointments (including a dozen judges) took place, but even then, the adjournments in question ranged from five weeks to twenty-one weeks in duration. *Id.* at 9-20; *see also* Henry B. Hogue, Cong. Res. Serv., *Intrasession Recess Appointments to Article III Courts* 2 (Mar. 2, 2004) [hereinafter 3/2/04 CRS Report]. Only since the 1970s have recess appointments during intra-session adjournments become a more recurrent, rather than a sporadic and extraordinary, practice. A practice “of such recent vintage,” *Printz v. United [*19] States*, 521 U.S. 898, 918, 117 S. Ct. at 2376 (1997), cannot serve to justify the constitutionality of an otherwise unconstitutional practice.

Even the *recent* history does not support Judge Pryor’s nomination. From 1954 until the Pryor nomination, Presidents made *no* intra-session appointments to Article III judgeships. *See* 3/2/04 CRS Report, *supra*, at 2. What is more, Judge Pryor’s appointment came during a ten-day adjournment that is by far the shortest intra-session “recess” during which any Article III appointment has been made.⁶ *Id.* This appointment is therefore an historical anomaly, not business as usual.

II. THE PRESIDENT MAY NOT MAKE RECESS APPOINTMENTS OF ARTICLE III JUDGES UNDER THE CIRCUMSTANCES PRESENT HERE

By filling offices with judges who lack the Article III protection of life tenure, recess appointments of federal judges, under any cir-

⁶ The next-shortest adjournment for an Article III intra-session appointment occurred in 1948, when President Truman made several appointments at the beginning of a break scheduled to last more than six months but that in fact lasted only five weeks. *See* 41 Op. Att’y Gen. 463, 468 (1966); 4/23/04 CRS Report, *supra*, at 16. Even beyond judges, intra-session recess appointments within short recesses are exceedingly uncommon. Before the current President, only two of the nearly 300 intra-session appointments were made during recesses of under ten days, and only twenty-seven during recesses of between 11 and 20 days. *Id.*

cumstances, dilute Article III's guarantees of judicial independence. Given the grave constitutional doubt that any intra- [*20] session recess appointments are constitutional, the intra-session appointments to Article III judgeships clearly transgress constitutional bounds.

A. Principles of Judicial Independence

The Constitution envisions a federal judiciary composed of judges whose "jealously guarded" independence is assured by the "clear institutional protections" of life tenure and guaranteed salary. *N Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60, 102 S. Ct. 2858, 2866 (1982). This independence is a fundamental part of the constitutional design. One of the charges that the Declaration of Independence leveled against the King was that he had "made Judges dependent on his Will alone, for the tenure of their Offices, and the Amount and Payment of their Salaries." The Declaration of Independence para. 11 (U.S. 1776). To remedy these defects, the Framers established "permanency in office" and a guaranteed salary as "indispensable ingredient[s] in [the] constitution" that could protect the judicial "firmness and independence" that served "as the citadel of the public justice and the public security." *The Federalist* No. 78, at 538 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ; *see also* Hart Letter, *supra*, at 2 ("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."); *cf.* 106 Cong. Rec. 18,130 (1960) [*21] (statement of Sen. Ervin) (describing the harm that could be done to judicial independence by recess appointments to the Supreme Court).

To ensure judicial independence, the Supreme Court has emphasized that federal judges exercising full Article III powers should have Article III's basic protections. In *Glidden Co. v. Zdanok*, 370 U.S. 530, 82 S. Ct. 1459 (1962), a majority of the Court affirmed the decisions of appellate panels comprised partly of judges from the Court of Claims and the Court of Customs and Patent Appeals only because those judges were protected by Article III. By contrast, in

Northern Pipeline, the Court invalidated a statute that authorized bankruptcy judges lacking Article III protections, 458 U.S. at 60-61, 102 S. Ct. at 2866, to exercise Article III power over a “broad range of questions,” *id.* at 74. Recess-appointed judges sit on Article III courts such as this one, and exercise the full authority of Article III judges, yet they are deprived of Article III’s protections of judicial independence. First, by the express words of the Recess Appointments Clause, they serve only temporary terms. Second, their salaries, if any, are at the mercy of Congress. *See, e.g.*, Act of Feb. 9, 1863, ch. 26, § 2, 12 Stat. 642, 646 (1863) (prohibiting payment of recess appointees until confirmation by the Senate); 5 U.S.C. § 5503 (2004) (detailing circumstances under which recess appointees may not be paid); Act of Jan. 23, 2004, Pub. L. No. 108-199, § 609, 118 Stat. 3 (2004) (depriving payment to recess appointees once their nominations are rejected).

[*22] The absence of protections for judicial independence subjects recess-appointed judges to political pressure from both the Legislative Branch and the Executive Branch. Recess-appointed judges are vulnerable to the President because he has the power to withdraw the judge’s nomination (if the candidate is already nominated) or to withhold the judge’s nomination (if the judge has not yet been nominated). More important, because Congress has power over such a judge’s salary and his ultimate appointment, the judge may consciously or unconsciously calibrate decisions to appease Senators who would subject such decisions to close scrutiny at subsequent confirmation hearings.

Justice Brennan, who received a recess appointment to the Supreme Court in 1956, was aggressively questioned about his views on communism by Senator Joseph McCarthy during his subsequent confirmation hearings. *See Woodley*, 751 F.2d at 1015 (Norris, J., dissenting); *cf. Recess Appointments to the Supreme Court, supra*, at 141-42 (suggesting that concerns about such questioning led the Supreme Court to delay issuing two decisions written by Justice Brennan).

Similarly, Judge Pryor himself is already scheduled to sit on at least one case involving a highly controversial issue concerning the

qualified immunity of prison guards, with respect to which Senators have previously criticized him after the Supreme Court rejected his arguments (made in his capacity as Alabama's Attorney General) in *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002). See [*23] Jonathan Ringel, *11th Circuit to Rehear Strip-Search Case En Banc*, Fulton County Daily Report, Apr. 12, 2004 (describing then-Attorney General Pryor's advocacy and explaining how a case to be heard en banc by the Eleventh Circuit, *Evans v. City of Zebulon*, 351 F.3d 485, 490, 497-98 (11th Cir. 2003), *reh'g en banc granted*, 364 F.3d 1298 (2004), involves a similar question); 149 Cong. Rec. S 14,085 (daily ed. Nov. 6, 2003) (statement of Sen. Kennedy) (criticizing Pryor's argument in *Hope v. Pelzer*); 149 Cong. Rec. 514,085 (daily ed. Nov. 6, 2003) (statement of Sen. Schumer) (same); 149 Cong. Rec. S10,251 (daily ed. July 30, 2003) (statement of Sen. Durbin) (same). It is certain that Congress will closely consider any vote or opinion by Judge Pryor on this issue when it later considers his nomination. Such scrutiny may place serious pressures on Judge Pryor's decisions, making him a judge who decides cases with "one eye over his shoulder on Congress." Professor Paul A. Freund, Harv. L. Sch. Rec., Oct. 8, 1953, *reprinted in* House Comm. on the Judiciary, 86th Cong. 1st Sess., *Recess Appointments of Federal Judges* (Comm. Print Jan. 1959).

Politically vulnerable judges undermine the rights of individual litigants "to have claims decided before judges who are free from potential domination by other branches of government." *CFTC v. Schor*, 478 U.S. 833, 848, 106 S. Ct. 3245, 3255 (1986) (quoting *United States v. Will*, 449 U.S. 200, 218, 101 S. Ct. 471, 482 (1980)). No one, whether litigants or non-parties, will "believe the decision is that [*24] of judges 'as independent as the lot of humanity will admit,' if the decisive vote is cast by a [judge] whose job depends, among other things, on his surviving thereafter the raking fire of confirmation hearings," or the political inclinations of the President who controls the nomination. Hart Letter, *supra*, at 2. When a recess-appointed judge is subject to such external pressures, individual litigants lose the protections that Article III guarantees.

Even if an individual recess-appointed judge is not *in fact* influ-

enced by the political branches, the fact that a federal judge appears to be vulnerable to politics threatens the public perception of the judiciary as a legitimate institution. *Cf.* 28 U.S.C. § 455 (2004) (requiring the recusal of judges for the appearance of bias). The public perception of the illegitimacy of Judge Pryor's decisions will harm the judiciary even if Judge Pryor himself is in fact judging without fear or favor.

B. Prior Precedent

It is true that the only two courts of appeals to have addressed this issue have upheld recess appointments of federal judges. *Allocco*, 305 F.2d at 708-09; *Woodley*, *supra*. Judge Norris's dissenting opinion in *Woodley* presents a comprehensive and carefully reasoned analysis of the issue and compellingly demonstrates the fundamental weaknesses in both cases. At the very least, his opinion demonstrates vividly why those who would apply the recess-appointment power broadly have a heavy burden to meet.

[*25] Neither *Allocco* nor *Woodley* relied upon the text or structure of the Constitution. Indeed, the *Woodley* court acknowledged that the text of Articles II and III provides no basis for favoring one over the other in attempting to reconcile the inevitable tension between the two Articles on the question of recess appointments of federal judges. 751 F.2d at 1010. In choosing to subordinate Article III to Article II, both courts relied virtually exclusively upon "historical practice, consensus, and acquiescence." *Id.*; *Allocco*, 305 F.2d at 709, 713-14. In particular, each majority emphasized that President Washington made recess judicial appointments without any objection from Congress or from Framers who were members of Washington's cabinet (Hamilton, Jay, and Randolph), and that the practice has continued unabated, allegedly with "unbroken acceptance," *Woodley*, 751 F.2d at 1011, throughout the nation's history. *See id.* at 1010-12; *Allocco*, 305 F.2d at 709.

The four-judge dissent in *Woodley* demonstrated why both courts were mistaken in assuming that history resolves the question. Of course, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh v. Chambers*,

463 U.S. 783, 790, 103 S. Ct. 3330, 3335 (1983).⁷ Early Presidents did *not* adopt the practice of judicial recess appointments [*26] after considered, reasoned deliberation as to the constitutional question. 751 F.2d at 1026-28 (Norris, J., dissenting); *cf. Marsh*, 463 U.S. at 791, 103 S. Ct. at 3336 (explaining that the First Congress “considered carefully” objections to legislative prayer based upon the First Amendment, which was debated and approved that same week). Moreover, Presidents have *unilaterally* adopted the practice in question, *without* any congressional input or approval – indeed, without even any *opportunity* for the legislature to weigh in. 751 F.2d at 1026. Thus, the historical precedent, no matter how longstanding, cannot resolve the constitutional impasse. The dissenters correctly concluded that because history – like text, structure, and evidence of the Framers’ intent – does *not* provide a resolution to the “extraordinary situation” of “a direct conflict between two provisions of the Constitution,” *id.* at 1017 (Norris, J., dissenting), it is necessary to evaluate and balance the competing constitutional values at stake, *id.* at 1015 (Norris, J., dissenting). They then proceeded to demonstrate that the recess appointment of judges seriously undermines the constitutional command “that the independence of the Judiciary be jealously guarded,” *id.* at 1022 (Norris, J., dissenting) (quoting *Northern Pipeline*, 458 U.S. at 60, 102 S. Ct. at 2866).⁸

⁷ See also *id.* (“It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.”) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970)).

⁸ The court in *Allocco* further relied on the questionable empirical assumption that political pressures on judges were at best a “hypothetical risk,” 305 F.2d at 709, an assumption explicitly cited by the court in *Woodley*, 751 F.2d at 1014. Thus, both decisions fail to appreciate the far-reaching consequences of their arguments in an era where Congress closely scrutinizes the judiciary and the federal courts decide highly charged political issues. The *Allocco* court also underestimated another significant cost of permitting recess appointments of judges when it casually dismissed the argument that a President could use “the recess power to avoid the necessity of securing consent of the Senate whenever he found that advisable,” and that “[b]y waiting until the Senate adjourns [the President] could fill judicial and other high offices with men unacceptable to the Senate,” thus “present[ing] the Senate, after it reconvenes, with a *fait accompli*, forcing it to confirm his choice

[*27] The dissenters also demonstrated that in this context “[t]he concerns for efficiency, convenience, and expediency that underlie the Recess Appointments Clause pale in comparison.” *Id.* at 1024. As explained above, brief Senate adjournments do not in any material respect diminish the capacity of the Senate to fulfill its constitutionally assigned advice-and-consent role. Even if President Bush were correct that this Court “need[ed] more judges to do its work with the efficiency the American people deserve and expect,” White House Statement on Appointment of William H. Pryor, Jr., February 20, 2004, *available at* <http://www.whitehouse.gov/news/releases/2004/02/20040220-6.html>, it was inappropriate to alleviate any harm to the judicial process as a result of the continuing vacancy by resort to the Recess Appointments Power, which was *not* designed to permit the President to install judges that the Senate has declined to confirm.

[*28] Finally, neither *Woodley* nor *Allocco* considered the constitutionality of intra-session recess appointments of federal judges, the principal issue here. For the reasons discussed above, such appointments pose different and troubling questions well beyond the difficulties posed by recess appointments generally.

C. Circumvention of the Senate’s Role Under the Constitution

The reasoning of *Allocco* and *Woodley* cannot justify President Bush’s recess appointment of Judge Pryor, which raises particular concerns under Article III. The circumstances surrounding Judge Pryor’s nomination plainly demonstrate that this recess appointment was used to circumvent the Senate’s advice-and-consent role and the requirements of Article III. The fact that a vacancy remained open on this Court as of the date of Judge Pryor’s appointment was not in any respect the result of the Senate’s brief holiday recess; it

or to ignore a man already in office.” 305 F.2d at 714. The court, noting that the Senate has confirmed almost all recess appointees to the bench, concluded that “history is eloquent proof” that such abuses are unlikely to occur. *Id.* That confidence, however, is belied by recent recess appointments, including that of Judge Pryor.

was, instead, a function of the fact that the Senate, acting *in its constitutionally assigned role*, *already had declined* to confirm Judge Pryor, and of the President's failure to nominate for confirmation someone whom the Senate would be more likely to confirm pursuant to its longstanding rules. In these circumstances, invoking that short adjournment as a justification for circumventing the Senate's constitutional role is a manifest charade.

[*29] Judge Pryor's recess appointment stands in stark contrast with earlier uses of the recess-appointment power, which raised far fewer concerns with respect to Article III because there was little reason to believe that the Senate would not confirm the judges in question. As a recent report notes, most judicial recess appointees "were uncontroversial, with the recess appointment serving merely as a mechanism of convenience to allow the appointee to take office sooner rather than later." Stuart Buck et al., *Judicial Recess Appointments: A Survey of the Arguments* 13 (2004), available at http://fairjudiciary.com/cfl_contents/press/recessappointments.pdf. Thus, it is not surprising that the Senate has confirmed the "vast majority" (approximately eighty-five percent) of recess-appointed judges. *See id.* Unlike these earlier uses of the recess-appointment power, the President's appointment of Judge Pryor was not merely a "mechanism of convenience" but rather an effort to circumvent the Senate's confirmation process. Mayton, *supra*, at 41.

None of the factors that have been invoked as allegedly making the Pryor recess appointment distinctive, and thus as preventing that appointment from serving as a precedent for countless others, withstands analysis. If the concerns supposedly justifying President Bush's recess appointment in this case constitute sufficiently exigent circumstances to validate an intra-session recess appointment, then almost every future recess appointment could be made during extremely short [*30] Senate recesses on the same basis. If the Pryor nomination is validated, it would become an invitation to the current or any future President to use the Recess Appointments Clause to bypass Article II's advice-and-consent requirement, during any or all of the numerous weekend and holiday adjournments that characterize every Senate session.

CONCLUSION

For the foregoing reasons, the Court should declare, as a jurisdictional matter, that Judge Pryor's recess appointment is unconstitutional and that he may not participate in these cases as a circuit judge.

Respectfully Submitted,

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